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Douglas J. Allred, George S. Diumenti v. Larry H. Brown and Arthur J. Ritter : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS
OF
THE STATE OF UTAH

DOUGLAS J. ALLRED and **GEORGE S. DIUMENTI,** Plaintiffs and Appellees,	:	Case No. 93-~~0467~~ 0815-CA
vs.	:	
LARRY H. BROWN and ARTHUR J. RITTER, Defendant and Appellant	:	Priority No. ~~16~~ 15

BRIEF OF APPELLANT
LARRY H. BROWN

AN APPEAL FROM A FINAL JUDGMENT
ENTERED BY THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
THE HONORABLE JAMES S. SAWAYA, PRESIDING.
(Case Below No. C-86-090-3354)

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Defendant **Larry H. Brown**

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THE STATE OF UTAH

DOUGLAS J. ALLRED and	:	
GEORGE S. DIUMENTI,		Case No. 93-0467
Plaintiffs and	:	
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	:	
vs.		
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ARTHUR J. RITTER,	:	
Defendant and		
Appellant	:	

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Cases

II. Statutes and Rules

III. Other Authorities

IN THE COURT OF APPEALS
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Defendant/appellant, **Larry H. Brown** ("Brown") by and through counsel of record, submits the following **Brief of Appellant:**

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1953 as amended). However, the Utah Supreme Court has assigned this

case to this Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) (1953 as amended).

STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW

I. Issues

1. The trial court erred when it found a bailment between plaintiffs Douglas Allred and George Diumenti (collectively "Diumenti")[1] and Brown where the court had already ruled that no contract existed between Diumenti and Brown and where there was **no** evidence to establish that any bailment agreement existed between Diumenti and Brown, or that any such agreement between the two should be implied.

2. The trial court erred when it found that a supposed bailment between Diumenti and Brown included an agreement that Brown provide insurance for Diumenti's airplane where there was **no** evidence to establish that any bailment agreement[2] -- much less an agreement concerning insurance -- existed between Diumenti and Brown and where the law does **not** imply that Brown, as a bailee, insure the airplane.

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[1] The second plaintiff, Douglas J. Allred was not involved in any of the dealings, meetings, transactions, etc. pertinent to this lawsuit.

[2] Brown has marshalled all of the evidence presented which might support such a finding in the Appendix.

3. The trial court erred in awarding damages against Brown on the basis of a bailment between Diumenti and Brown where the court made **no** finding that Brown was negligent.

4. Because there was **no** evidence that Brown was negligent and ample evidence that Brown exercised the requisite care of Diumenti's airplane and because a finding of negligence is necessary before liability can be imposed, the trial court erred in holding Brown liable for damage to Diumenti's airplane.

II. Standard of Review

To challenge the trial court's factual finding that a bailment existed between Diumenti and Brown, Brown must "(1) marshall all of the evidence that supports the finding, and (2) demonstrate that, despite the evidence, the finding is so lacking in support as to be 'against the clear weight of evidence' and thus, clearly erroneous." Edwards & Daniels v. Farmers' Properties, 228 Utah Adv. Rep. 14, 16 (Utah App. 1993), ___ P.2d ___, *quoting*, Doelle v. Bradley, 784 P.2d 1176, 1178 (Utah 1989).

However, this court should review the correctness of the trial court's legal conclusions. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985). Accordingly, this court

should not defer to the following erroneous legal conclusion made by the trial court:

1. that a bailment agreement, which included an insurance provision, existed between the Diumenti and Brown since the trial court had already ruled that no contract existed between Diumenti and Brown;

2. that Brown could be liable for damages on the airplane since the trial court made no finding that Brown was negligent in his operation of the airplane; and,

3. that Brown could be liable for damages on the airplane since Brown established that he was not negligent and although Diumenti did not provide any evidence to show negligence.

STATEMENT OF THE CASE

I. Nature of the Case

To resolve this case, this Court must interpret the common law of bailments. While bailment may be a straight forward notion, several issues complicate this case.

As this Court has already noted, "[a] bailment is created when a party's personal property is delivered to another 'in trust for a specific purpose, with an express or implied contract that the property will be returned or

accounted for when the specific purpose has been accomplished or when the bailor reclaims the property.'" Decision of Utah Court of Appeals in First Appeal, May 12, 1992, ("Decision in First Appeal") at 2, fn. 1, exhibit "a" attached, *quoting* Christensen v. Hoover, 643 P.2d 525, 528-29 (Colo. 1982).

On the basis of this analysis, this Court must decide whether, by piloting the airplane for Ritter, Brown became a bailee of the aircraft. This inquiry must consider, among other issues, that the trial court has already determined that no contract ever existed between Brown and Diumenti. Decision in First Appeal at 3. The trial court dismissed Diumenti's breach of contract claim against Brown on the basis that any agreement concerning the airplane was made between only Diumenti and Ritter. Primary Trial Transcript at 74.

If, despite the trial court's dismissal, this Court does find that a bailment exists between Diumenti and Brown, this Court must then determine if, pursuant to this bailment, Brown is liable for damages to the airplane. This Court has already held that negligence "is the basis for liability in a cause of action for bailment." Decision in First Appeal at 3, *citing*, Sumsion v. Streator-Smith, Inc.,

103 Utah 44, 132 P.2d 680 at 685-86 (Utah 1943) (other citations omitted). Thus, this Court's determination concerning liability must reflect that the trial court made no finding that Brown was negligent in his operation of the airplane. Indeed, Brown provided sufficient evidence to prove that he exercised due care in his operation of airplane and Diumenti offered no evidence to counter this conclusion.

Finally, because the trial court has refused to rule on Diumenti's negligence theory -- and avoid a possible third appeal of this case -- this Court should determine that the evidence at trial is sufficient to determine that Brown exercised due care in his operation of the airplane.

II. Course of the Proceedings and Dispositions Below

Diumenti sued Brown and Ritter for damages caused to his airplane in a May 9, 1984 accident at the Tooele County Airport, asserting (1) breach of contract; (2) negligence; and (3) bailment. Plaintiffs' Complaint, exhibit "1" attached. The case was tried in April 1989 before the Honorable James Sawaya in the Third District Court of Salt Lake County. During that trial, the court dismissed the

first cause of action -- the breach of contract claim -- against Brown. Primary Trial Transcript at 74.

However, in a Memorandum Decision issued on June 14, 1989, (exhibit "g" attached), and Findings of Fact and Conclusions of Law entered on July 18, 1989, (exhibit "h" attached), the court ruled that Ritter and Brown were jointly and severally liable for damages to the airplane because they failed to fulfill their contractual obligation to insure the airplane. The court made no ruling on Diumenti's bailment or negligence claims and awarded substantial monetary damages against Ritter and Brown. Id.

Brown immediately appealed that decision. In an unpublished opinion dated May 12, 1992, this Court agreed that Brown could not be labile to Diumenti for breach of contract. Decision in First Appeal, exhibit "a" attached. This Court remanded the case to the trial court for reconsideration of Diumenti's bailment and negligence causes of action. Id.

On June 8, 1993, oral arguments concerning this Court's decision were made to Judge Sawaya, now retired, but sitting by special assignment. The parties submitted written argument to the trial court, but presented no further evidence. In its Findings of Fact and Conclusions of Law

dated July, 1993 (exhibit "b" attached) and Order and Judgment dated September 7, 1993, (exhibit "c" attached), the trial court again awarded the same damages assessed against Brown after the 1989 trial, but now on a bailment theory. The court concluded that "under the bailment, there was an express agreement between the parties that defendants would obtain insurance to cover the airplane. . . ." Id. at 3.

Immediately after this second decision was handed down, Brown moved the trial court to make findings with regard to the negligence theory. Brown's Motion for New Trial & for Amended Findings & for More Findings, dated June 23, 1993, exhibit "e" attached. Although Brown has subsequently requested that the trial court rule upon that motion, the trial court has yet to do so. *See*, Notice to Submit for Decision, dated August 23, 1993; a duplicate copy of which was filed on or about November 4, 1993, exhibit "f" attached.[3]

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[3] In light of the trial court's declination to rule upon Brown's Motion for New Trial dated June 23, 1993, (exhibit "e" attached) and in light of the entry of the new Findings of Fact and Conclusions of Law (exhibit "b" attached) in July, 1993 and the entry of said new Order and Judgment, (exhibit "c" attached) on September 7, 1993, Brown must assume that the trial court has denied his motion for a new trial.

Brown is now appealing the trial court's second ruling. His notice of appeal (exhibit "d" attached) dated September 9, 1993 was timely filed.

STATEMENT OF FACTS

At the time relevant to this proceeding, Brown was the manager of operations and chief pilot of a company, (Primary Trial Transcript at 5-6), for which co-defendant Ritter was the business manager. Id. at 77. The company, Mercury Aircourier Service ("Mercury"), provided passenger air service and transported cargo by airplane to various sites in Utah. Id. at 24. As business manager of Mercury, Ritter was responsible for all the routine business functions of the company including "contracting for aircraft" for the company to use. Id. at 77. Brown's duties, in contrast, centered upon flying the company's airplanes. Id. at 5-6.

In April 1984, Ritter entered into negotiations to lease a Cessna 414 airplane belonging to Diumenti as part of Mercury's new business venture. Primary Trial Transcript at 34; Findings of Fact and Conclusions of Law (July, 1989) at 2, ¶ 2 (exhibit "h"). Ritter and Brown met with Diumenti at Ritter's home to discuss the general terms of a lease that

would be entered into by Mercury. Primary Trial Transcript at 34.

The trial court determined, Ritter, not Brown, was responsible for the lease of the aircraft from its owners. Findings of Fact and Conclusions of Law (July, 1989) at 2, ¶ 2 (exhibit "h" attached). When it dismissed Diumenti's first cause of action for breach of contract against Brown, the trial court also concluded that there was no evidence to establish that a contract of any sort existed between Diumenti and Brown concerning the airplane. Primary Trial Transcript at 73-72.

Diumenti testified that, in all his discussions with Ritter, he understood that he was dealing with Ritter alone and that no third party was involved in the contract negotiations. Partial Trial Transcript (Diumenti) at 7, 9, 10, 33, 42 & 43. Diumenti recalled that Brown was introduced to him as Ritter's agent, as the person who would fly the aircraft if Ritter were to lease it from Diumenti. Id. at 8. Diumenti told the trial court specifically that the agreement concerning the airplane was made with Ritter, and "absolutely" **not** with Brown. Id. at 52. Ritter collaborated these statements, claiming that at no time during the discussion of securing insurance for the airplane

did Brown suggest that he would be responsible for obtaining the insurance. Primary Trial Transcript at 81. Brown also testified that he never intended to secure insurance for the plane and never told anyone else that he would. Id. at 53-54.

Unfortunately, before any written lease was signed between Ritter and Diumenti, while negotiations of the terms of the lease and inspection of the plane were both still in progress, the airplane sustained substantial damages ($30,000.00+) in a landing at the Tooele County Airport. Findings of Fact and Conclusions of Law (July, 1989) at ¶ 6. At the time of the accident, Brown was flying the plane and Ritter was the only passenger. Primary Trial Transcript at 22. Brown and Ritter were on their way to have the airplane weighed to comply with the rules of the Federal Aviation Administration. Id. at 30. Ritter instructed Brown to fly the aircraft to Tooele, Utah, to refuel it and to fly it to Logan, Utah for its weighing. Id. at 59.

Before May 9th, the day of the accident, neither Ritter nor Brown had the keys to the airplane. Primary Trial Transcript at 148 & 208. During this time, the aircraft was sometimes parked on the ramp in front of Thompson Beechcraft

at the Salt Lake Airport and was sometimes gone from that location. Id.

At the time of the accident, neither Brown nor Mercury was covered by Diumenti's property damage insurance on the plane. Findings of Fact and Conclusions of Law (July, 1993) at ¶ 10. There was no insurance coverage provided by Mercury or by the defendants to pay for the damage to the plane. Id. However, at the time of the accident, Brown thought that the airplane was insured -- he never intended to fly the airplane uninsured. Id. at 222.

At trial, there was no evidence that Brown was negligent in his operation of the airplane or during the fateful landing, or that his conduct was the proximate cause of the accident. Indeed, Brown established his significant flying credentials and detailed the steps which he followed before attempting to land the airplane before the accident, demonstrating that he exercised all due care in his operation of the airplane. In response, Diumenti was unable to provide any evidence which cast doubt on Brown's competency and reasonableness or to show that Brown's conduct was the cause of the accident.

First, Brown established himself as a very experienced pilot. His career as a pilot began when he entered the Air

Force in 1954. Primary Trial Transcript at 6. By 1974, when Brown retired from the Air Force, he had already logged over four thousand (4,000) hours of flight time in the service of his country. Id. at 9. In 1964 Brown obtained a commercial license with instrument privileges as a result of his military experience. Id. at 7. While from 1974 to 1980 Brown flew only recreationally, in 1980 he resumed flying regularly, this time as a commercial pilot for Air Express, Inc. Id. In this capacity, Brown flew a variety of airplanes including Cessnas 210 and 172, (Id. at 10-12), double engine airplanes as well as those with retractable landing gear. Id. at 12 & 14.

Before the accident, Brown flew Diumenti's airplane as a copilot and made three or four partial landings -- or go-arounds -- during which the plane was not completely stopped, but was touched down on the runway. Id. at 60. These maneuvers required Brown to operate the landing gear three or four times. Id. Before the accident, Brown also took forty-five (45) minutes on one or two occasions to familiarize himself with the controls of the airplane. Id. at 18-19.

At trial, Brown carefully explained the prelanding checklist that he used to prepare for landing the airplane

before the accident. Primary Trial Transcript at 210-212. Ritter, a licensed former Air Force pilot with twenty years of experience with the military, "challenged" Brown as to each item on the list and Brown would react appropriately. Id. In response to the challenge concerning the landing gear, Brown lowered the landing gear with the proper handle, saw the lowered nose gear in an exterior mirror designed for this purpose, felt the initial buffet that occurs when the gear is lowered and saw the indicator light that shows that the gear is lowered and locked. Id. at 211.

Approximately three or four miles from the airport, Ritter reiterated the landing gear challenge and Brown again checked that the handle was in the down position, looked at the extended nose gear in the mirror and saw that the gear-down light was on, before he responded to Ritter that the gear was down and locked. Id. at 212-213. This additional check of the landing gear was a common procedure for Air Force pilots. Id. From the time that the landing gear was lowered and locked, Brown and Ritter continued to feel a drag that occurs when the gear is locked into landing position. Id.

Not until the propeller of the airplane contacted the runway, did Brown realize that the landing gear had mal-

functioned. Id. at 214. Once aware of the problem, Brown attempted a "go-around" -- a maneuver which would take the airplane back into full flight. Id. at 215. However, because the right engine of the plane failed to generate sufficient power, Brown was forced to abandon this effort. Id. After the crash, but before leaving the airplane, Brown checked and determined that the landing gear lever was in the down position. Id. at 216.

The testimony of Ritter collaborates Brown's testimony that the landing gear was indeed down and locked when the airplane approached the runway and that Brown, as the pilot, followed all standard procedures to land the airplane properly. Id. at 95 & 97. Ritter also agreed that the right engine was quitting when Brown attempted to do a go-around. Id. at 94-95.

Paul Johnson, appearing for Brown, testified that once, in Diumenti's airplane, as pilot, he had experienced a problem with the landing gear, (Id. at 185), and twice had the engines quit on him after he had landed the aircraft. Id. at 188.

In response, Diumenti offered no evidence to counter Brown's demonstration that he exercised due care in his flying of the airplane. Diumenti presented no evidence that

Brown's conduct was the proximate cause of the accident. For example, Donald L. Magnuson, the official from the Federal Aviation Administration (the "FAA") whose job it was to investigate this accident, testified that in his report concerning the accident, he expressed **no** opinion as to the cause of the accident. Primary Trial Transcript at 67. Although the landing gear was retracted when Magnuson inspected the airplane and he later tested the gear and found it apparently functioning, Magnuson made no assertions or even suggestions concerning the cause of the accident or whether the landing gear was functioning properly when the airplane landed. Id. at 62-72. Magnuson made no inspection of either of the engines of the airplane, (Id. at 69-70), and did not test the landing gear with the weight of the airplane on it. Id. at 64-65.

Ron Nelson, called by Diumenti as a "rebuttal" witness, did not see the airplane after the accident and also declined to speculate on the cause of the accident. Id. at 239 & 243.

Allen Woodhouse, also Diumenti's witness who helped repair the airplane after the accident, testified that according to his experience, there is no way to raise the landing gear except with the lever intended for that

function. Id. at 256. However, Woodhouse also declined to speculate on the cause of the accident. Id. at 247-256.

Finally, the court remarked, at the close of Diumenti's case, that

> There's no testimony that they [Ritter and Brown] failed to do anything. The testimony as I understand it and the state of the evidence is simply that the aircraft crashed because the landing gear was not in the down position -- either was not in a down position or was in the down position and collapsed.

Id. at 75.

SUMMARY OF ARGUMENT

The trial court had no basis for finding Brown liable for the damage caused to the airplane during the ill-fated Tooele landing.

First, the trial court erred in its determination that a bailment existed between Diumenti and Brown. Having already determined that Brown was not liable to Diumenti for breach of contract, the trial court could not properly hold Brown liable to Diumenti under a bailment theory. The same evidence -- that Diumenti bargained exclusively with Ritter and believed he was dealing exclusively with Ritter -- which proved that Diumenti and Ritter, not Brown, were parties to any contract concerning the airplane, also shows that Ritter

and Diumenti, not Brown, were parties to any bailment of the airplane. Furthermore, as an agent of a fully disclosed principal, Brown is not liable on a contract entered into by Ritter.

Second, the trial court erred when, on the basis of an alleged express agreement, it insisted that Brown had a duty to obtain insurance for the airplane. Because the trial court had already determined that Brown was not a party to any contract concerning insurance, he could not be party to any bailment contract that included express terms concerning insurance. Furthermore, all parties agreed at trial that Brown never promised or suggested -- never made any express statements -- that he would take any steps toward securing insurance for the plane. As a result, any bailment which might involve Brown must be an implied bailment. However, the law has long concluded that under a implied bailment, the bailee is under no obligation to insure or act as insurer of the object of the bailment.

Third, the trial court was mistaken when it found Brown liable for damages to the airplane under a supposed bailment contract. A finding of negligence is necessary before a bailee can be liable for damages under a bailment -- the trial court made no such finding. Furthermore, Brown

established at trial that he exercised due care in his handling and operation of the aircraft. In turn, Diumenti offered no evidence to counter this showing. As a result, Brown cannot be liable for damages to the airplane under a bailment theory.

Finally, this Court should dismiss, with prejudice, Diumenti's cause of action alleging Brown's negligence. At trial, Diumenti was completely unable to provide any evidence that Brown was negligent in his operation of the airplane. Brown has repeatedly asked the trial court to make a determination on this cause of action and he has been refused. In addition, this Court previously remanded Diumenti's negligence claim to the trial court for determination, which it declined to do. To avoid subjecting Brown to the prospect of continued meritless litigation, this Court should rule on this issue by dismissing Diumenti's negligence claim.

ARGUMENT

I. No Bailment Existed Between Diumenti and Brown.

A. Because the Trial Court Already Determined that No Contract Existed Between Diumenti And Brown, there Can Be No Bailment Between the Two.

A bailment is a contract. As this Court explained in its first decision in this case, the "'relation [between] bailor and bailee is created in contract.'" Decision in First Appeal at 2 (exhibit "a" attached), *quoting*, Potomac Ins. Co. v. Nickson, 64 Utah 395, 231 P. 445, 448 (Utah 1924); *also citing*, Sumsion v. Streator-Smith, Inc., 103 Utah 44, 132 P.2d 680, 685 (1943) ("the entire duty of the bailee with respect to the bailed chattel is based on the bailment contract"). As a result, because there was no contract (either express, implied or constructed) between Diumenti and Brown, there can be no bailment.

Bailment agreements are a subset of all contracts. The same elements and inquiries which govern the formation and sufficiency of a contract govern the formation and sufficiency of a bailment. Sumsion, 132 P.2d at 685; 8 Am.Jur.2d, *Bailments* § 54 (1980); 8 C.J.S., *Bailments* § 19 (1980). Because a cause of action based on the law of contracts is analogous to one founded on a bailment, the trial court's dismissal of Diumenti's contract claim against Brown

requires that the bailment claim against Brown also be dismissed.[4] Where there is no contract, there can be no bailment.

B. There Is Insufficient Evidence To Establish a Bailment Between Diumenti and Brown.

As explained above, the dismissal of Diumenti's contract claim against Brown dictates that Diumenti's bailment claim also be dismissed against Brown. Furthermore, the trial court's determination that there was insufficient evidence to establish a contract between Diumenti (leading to the dismissal of the contract claim) indicates that there was insufficient dealings between Diumenti and Brown for the purposes of creating a bailment agreement.

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[4] Although this Court, on the first appeal, closely identified a contract claim with a bailment claim, it did not specifically dismiss the bailment claim against Brown on the basis of the trial court's dismissal of the contract claim. Decision in First Appeal at 2. However, this court was never asked to do so. Id. at 1. Furthermore, while this court previously refused to equate Diumenti's bailment claim with his contract claim, it did so on the basis that the trial court made no finding concerning negligence -- a requirement for attaching liability to a bailment. Id. at 3.

The evidence presented at trial fails to establish that any agreement existed between Diumenti and Brown.[5] For example, in all his discussions with Ritter, Diumenti understood that he was dealing with Ritter and that no one else was party to the negotiations concerning the airplane. Partial Trial Transcript (Diumenti) at 7, 9, 10, 33, 42 & 43. Before negotiations concerning the airplane were begun, Brown was introduced to Diumenti as Ritter's agent -- the person who would fly the airplane -- rather than as a party to any agreement concerning the aircraft. Id. at 8. Diumenti told the trial court specifically that the agreement concerning the airplane was made with Ritter, and "absolutely" not with Brown. Id. at 52.

Diumenti also testified that Brown **never** promised or stated that he, Brown, would take any steps concerning insuring the airplane. Id. at 50-51. Instead, Brown's only role related to the agreement was that he would be the sole person who would fly the airplane. Id. Ritter's testimony confirms Diumenti's understanding. Ritter stated that at no time during the discussion of securing insurance for the

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[5] Brown has marshalled all of the evidence that might support a finding of a bailment and agreement between Diumenti and Brown, attached hereto as an appendix.

airplane did Brown suggest that he would be responsible for obtaining the insurance. Primary Trial Transcript at 81.

Given that neither Diumenti, Ritter nor Brown believed that Brown was a party to the airplane agreement, that Brown's role in the airplane agreement was that he would pilot the plane and that Brown never made any promises or other statements that he would take any steps concerning insurance for the plane, it is clear that there was no bailment between Diumenti and Brown. Instead, Ritter and Diumenti were the only parties to the lease agreement, and any bailment of the airplane was between Diumenti and Ritter. Because the contract was not with Brown, as Diumenti testified and the trial court concluded, then the any bailment cannot be with Brown. The law of contract and the law of bailment has never been that by acting only as the pilot of an airplane, an individual will somehow become party to any general agreement concerning that aircraft.[6]

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[6] The presence of Ritter in the plane at the time it crashed and was damaged is consistent with the theory that there was a contract or a bailment with Ritter, but not with Brown. Although Brown was piloting the plane at the time of the crash, Ritter was in possession of the plane and Brown only his pilot.

C. As an Agent Of Ritter, Brown Is Not Party To and Therefore Not Liable On Any Contract Entered Into By Ritter, a Fully Disclosed Principal.

The fundamental tenets of agency law hold that the agent of a disclosed principal is not party to a contract entered into by her principal -- even when the agent participates in the formation of the contract on behalf of the principal. *Restatement (Second)*, Agency § 320. Because Brown was acting only as Ritter's agent or servant for the purposes of operating the airplane, he is not party to any agreement concerning the aircraft. Id.

The evidence clearly established that Ritter was the sole defendant party to any agreement concerning the airplane. The trial court determined that Ritter, not Brown, leased the aircraft from Diumenti, (Findings of Fact and Conclusions of Law (July, 1989) at 2, ¶ 2) and that no contract existed between Diumenti and Brown concerning the airplane. Primary Trial Transcript at 74, Decision in First Appeal at 3. Diumenti specifically testified that he entered into a lease agreement concerning the airplane with Ritter, not Brown. Partial Trial Transcript at 52. Thus, Diumenti always knew that he was dealing with Ritter, not Brown, in entering an agreement concerning the plane.

These same findings and facts show that Brown's role in any agreement concerning the airplane was necessarily limited to acting as an agent or a servant of Ritter. Id. Brown was not a party to the agreement concerning the plane and no one thought that he was. Id. Instead, Brown was introduced as and understood to be Ritter's agent -- the pilot of the plane Ritter intended to lease. Partial Trial Transcript at 8 & 51-52. Brown never made any promises to anyone suggesting that he would obtain insurance for the airplane. Id.

Given Brown's role as pilot, rather than as a party to the airplane agreement, agency law requires that Ritter be solely liable for any contract or bailment which involved the airplane. Brown, as Ritter's agent or servant, is not liable for an agreement (either express, implied or constructed) between Diumenti and Ritter.[7] *Restatement (Second) Agency*, § 320. Again, the law does not hold Brown to be party to an agreement concerning the airplane solely on the basis that Brown was to be the pilot of the plane.

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[7] An agent or a servant is liable for her or his tortious conduct. *Restatement (Second) Agency* § 350. However, to make a successful tort claim, Diumenti must show that Brown acted unreasonably, failed to exercise due care and that Brown's negligence was the proximate cause of the damage to the airplane. Diumenti has not done this. *See*, infra. at Points III & IV.

II. Assuming that a Bailment Existed Between Diumenti and Brown, the Terms Of this Agreement Are Implied and Therefore Do Not Include Any Provisions Concerning Insurance.

A. Because the Trial Court Already Determined that No Contract Existed Between Diumenti and Brown, the Terms Of Any Supposed Bailment Between the Two Must Be Implied.

The trial court erred when it concluded that "under the bailment, there was an **express** agreement between the parties that defendants would obtain insurance to cover the airplane during the time the airplane was in the defendants [sic] possession." Findings of Fact and Conclusions of Law (July, 1993), ¶ 8 (emphasis added); *see*, Appendix for marshalled facts. In light of its previous determination that there was no agreement between Diumenti and Brown and its dismissal of Diumenti's breach of contract claim against Brown, (Primary Trial Transcript at 74, Decision in First Appeal at 3), the trial court cannot rule that Brown was a party to any expressed agreement with Diumenti.

While the trial court had decided that "the oral agreement between the parties was that defendants agreed either to take steps to be added to plaintiff's insurance, or to obtain their own insurance policy," (Memorandum Decision (June, 1989), ¶ 2 (exhibit "g" attached), it also specifically **rejected** the possibility that a such an agreement concerning insurance existed between Diumenti and

Brown. Primary Trial Transcript at 73-74; Decision in First Appeal at 3. Brown was not a party to the express agreement concerning insurance. Id. Brown never personally and expressly agreed to secure insurance. Therefore, any bailment to which Brown is a party cannot contain an "express agreement" concerning insurance -- he made no such agreement.

In addition, the same evidence discussed above which established, (1) that Ritter, not Brown was the sole defendant party to the airplane agreement; (2) that Brown never made any promises or suggestions that he would secure insurance for his operation of the aircraft; and (3) that Brown's role in the airplane agreement was limited to that of Ritter's agent, to pilot the leased aircraft, also proves that there was no express agreement between Diumenti and Brown concerning insurance for the aircraft. Because Brown was an agent or servant of Ritter, a fully disclosed principal, the tenets of agency law specifically require that Brown not be held liable on an express agreement which was made between and on behalf of Diumenti and Ritter.

Thus, on the basis of the evidence, the trial court's prior dismissal of the contract claim against Brown and agency law, there could not be an **express** agreement between

Diumenti and Brown concerning the insurance for the airplane.[8] This is particularly true because testimony from Diumenti, Ritter and Brown confirms that Brown never said that he would he would do anything to insure the airplane. Partial Trial Transcript (Diumenti) at 50-51; Primary Trial Transcript at 55 & 81. As a result, any express insurance agreement necessarily was between Diumenti and Ritter alone.

B. Even If A Bailment Existed Between Diumenti And Brown, the Law of Bailments Would Not Require Brown To Insure The Airplane.

When the terms of a bailment agreement are not express, but only implied, the courts do **not** impose a duty on the bailee to insure the bailed chattel. Although required to exercise due care toward the bailed property, the bailee has **no** duty to insure the property. As the Utah Supreme Court explained:

> Since there was no express contract in this case, the rights and duties of the parties are controlled by the contract which is implied by law from their conduct. . . . [T]he liability of the bailee is founded on negligence **for the law will not now imply an undertaking on the part of the bailee to insure the safekeeping of the chattels bailed.**

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[8] Brown has marshalled all of the evidence on the record that might support finding an express agreement between Diumenti and Brown. The inventory of the evidence is attached to this memorandum as an Appendix.

Sumsion, 132 P.2d at 685 (citations omitted, emphasis added); 8 Am. Jur.2d, *Bailments* § 136; 8 C.J.S., *Bailments* § 47.

Indeed, this Court has already noted, that in this case, a finding that a bailee was negligence would be necessary before the bailee could be liable for damage to the bailed chattel -- again showing that the bailee is under obligation to insure the property. Decision in First Appeal at 3, *citing* Sumsion, 132 P.2d at 685-86; Barlow Upholstery & Furniture v. Emmel, 533 P.2d 900, 901 (Utah 1975).

Given that Brown was not party to any express agreement concerning insurance on the airplane and that the courts will not obligate a bailee to insure the bailed property, Brown had no duty to insure the airplane. Similarly, the evidence in this case and the prior ruling in the trial court require that if a bailment exists in this case, it can be only an implied bailment. Because the courts will **not** require the bailee to insure the bailed property absent an express agreement, Brown owed **no** duty to Diumenti to insure his airplane. The Utah Supreme Court's further analysis in Sumsion confirms this conclusion: "[T]he plaintiff's evidence failed to prove an express insurer's contract, and

as we have seen from the above authorities the law will not imply one." Sumsion, 132 P.2d at 686.

III. Assuming that a Bailment Existed Between Diumenti and Brown, Brown is Not Liable for Damages to the Airplane Pursuant to this Agreement Because He Was Not Negligent in His Operation of the Aircraft.

A. Before A Bailee Is Liable For Damages To the Bailed Object, there Must Be a Finding Of Negligence and Proximate Cause.

As this Court already noted in its previous decision in this case, "negligence . . . is the basis for liability in a cause of action for bailment." Decision in First Appeal at 3, *citing* Sumsion, 132 P.2d at 685-86; Barlow Upholstery, 533 P.2d at 901 (a "bailee has a duty to exercise reasonable care and caution commensurate with acceptance of the responsibility of safekeeping the property of others entrusted to him"). Because negligence is an essential part of a plaintiff's case, she "has the ultimate burden of proof on this issue." Sumsion 132 P.2d at 686. If a plaintiff can show that a bailment exists and show that the bailed goods were returned in a damaged condition, he has made a prima facie case for negligence. Id. Further, when a prima facie case is made and when the bailee had exclusive possession of the bailed property, the defendant must establish that she exercised due care in her handling of the bailed property to

avoid liability. Id. This presumption rests on the practical consideration that when the bailee is in exclusive possession of the property, he has a better opportunity to establish the cause of the damage. Id. at 687.

However, "the cases almost universally hold that this inference of negligence will not arise in those cases where the bailor . . . had the same opportunity to ascertain the facts as the bailee." Id. In any case, the ultimate burden of establishing negligence rests on the plaintiff. Romey v. Covey Garage, 111 P.2d 545, 547 (Utah 1941) ("If considering the evidence on both sides the jury is not persuaded that negligence by bailee either did or did not exist, then it must find for bailee (defendant), because on bailor (plaintiff) rests the burden of proving negligence").

A plaintiff cannot rest on a prima facie case of negligence if the defendant presents evidence that she was not negligent. Staheli v. Farmers' Co-Op of Southern Utah, 655 P.2d 680, 683 fn. 1 (Utah 1982) ("[i]f the bailee proves due care, and the bailor relies on nothing more than the presumption, a directed verdict in bailee's favor would be appropriate"). In such a situation, a plaintiff still bears the burden of proving that the defendant (bailee) was negligent. Id.

In addition, there must be a finding that the bailee's negligence was the proximate cause of the damage to the bailed chattel. For example, in Sumsion, the Utah Supreme Court concluded that because there was no evidence that the bailee's negligence was the proximate cause of a subsequent automobile accident, the bailee was not liable for the damages which occurred to the bailors' car. Sumsion, 132 P.2d at 687. The Court arrived at this conclusion despite evidence that the driver of tow truck failed to signal before entering on to an icy road. Id. at 682. Although a coal truck hit plaintiffs' car almost immediately after the tow truck driver pulled away from the curb towing plaintiffs' car, the court found that no link had been established between the failure to signal and the subsequent accident. Id.; *see also*, Staheli, 655 P.2d 680, 684 ("[w]hen the proximate cause of an injury is left to speculation, the claim fails as a matter of law"); Carey v. Wallner, 744 P.2d 881 (Mont. 1987) (defendant (bailee) not liable for damage to tractor where cause of damage could not be determined).

On the basis of the rules which govern a cause of action in bailment and the evidence produced at trial, Brown is not liable for the damages to Diumenti's airplane.

First, the trial court made no findings or conclusions that Brown failed to exercise due care in his operation of the aircraft. Second, Brown testified at length and the trial court agreed, that he exercised all due care while flying and attempting to land the airplane. Finally, in response to this evidence, Diumenti was unable to offer any evidence to show either that Brown was negligent or that Brown's conduct was the proximate cause of the damage to the airplane. Essentially, Diumenti has left to speculation, the cause of the damage to his airplane. Because **none** of the elements necessary for assigning liability to Brown have been meet, Brown cannot be held liable.

B. The Trial Court Made No Finding That Brown Was Negligent or that His Conduct Was the Proximate Cause Of the Damage To the Airplane.

Already this Court emphasized that the trial court "did not make any findings or conclusions concerning negligence, which is the basis for liability in a cause of action for bailment." Decision in First Appeal at 3 (citations omitted). Despite this requirement, the trial court found Brown liable on the basis of bailment **without** making any findings or conclusions concerning negligence. Because the trial court has not complied with the requirements mandated by

this Court for finding Brown liable for damage to the airplane, the trial court made a fatal error in its assignment of liability to Brown. As this Court has already noted, without a factual finding or legal conclusion that Brown was negligent, he cannot be held labile for damage to the airplane.

C. At Trial, Brown Established that He Exercised All Due Care In His Operation Of the Aircraft.

The trial court made no finding that Brown failed to exercise due care in his operation of the airplane because it could not. The evidence at trial confirmed that Brown completely fulfilled his duty to exercise reasonable care while he flew and landed the airplane.

Brown relied on over four thousand (4,000) hours of flight time in the Air Force, (Primary Trial Transcript at 9), in addition to four (4) years of commercial flying experience when he flew the airplane. Id. at 7. Brown was familiar with the controls and operation of the airplane before the accident. When he flew the airplane to Idaho as a copilot, he made several partial landings of the aircraft which required Brown to operate the landing gear three or four times. Id. at 60. Before the accident, Brown also took forty-five (45) minutes on a couple occasions to

familiarize himself with the controls of the airplane. Id. at 18-19.

At trial, Brown also explained the prelanding checklist that he utilized to prepare for landing the airplane just before the accident. Primary Trial Transcript at 210-212. In response to Ritter's landing gear challenge, Brown lowered the gear with the proper lever, saw the lowered nose gear in an exterior mirror designed for this purpose, felt the initial buffet that occurs when the gear is lowered and saw the light that indicates that the gear is lowered and locked. Id. at 211.

A few miles from the airport, Ritter again made the landing gear challenge and Brown again checked that the handle was in the down position, looked at the extended nose gear in the mirror and saw that the gear-down light was on, before he responded that the gear was down and locked. Id. at 212-213. From the time that the landing gear was lowered and locked, Brown and Ritter continued to feel a drag that occurs when the landing gear is locked into the down position. Id. Finally, Brown testified that after the crash, but before leaving the airplane, he checked and determined that the landing gear lever was still in the down position. Id. at 216.

The testimony of Ritter fully collaborates Brown's testimony that the landing gear was indeed down and locked when the airplane approached the runway and that Brown, as pilot, followed all standard procedures to land the airplane properly. Id. at 95 & 97. Paul Johnson, another experienced pilot, testified that once while piloting Diumenti's airplane, he had experienced a problem with the landing gear, (Id. at 185), and twice had the engines quit on him upon landing the aircraft. Id. at 188.

Clearly, Brown has proven that he was not negligent in his operation of the airplane. By all accounts, Brown was extremely thorough and careful both in his flying and preparation to land the aircraft. On the basis of the evidence, Brown has readily met the burden of overcoming any presumption that he was negligent in the operation of the aircraft. Because Brown was not negligent, he cannot be liable for any damage to the airplane.[9]

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[9] While Brown has proven that he was not negligent in his operation of the airplane, he does not have the burden of showing that he was not at fault. Because the trial court made no finding that the airplane was in Brown's exclusive possession before the May 9 flight, the presumption of Brown's negligence -- based on the damage of the aircraft -- cannot be made.

The evidence also shows that Brown was not in exclusive possession of the airplane. Before the accident, neither Ritter nor Brown had the keys to the airplane. Primary Trial Transcript at 148 & 208. During this time, the

D. At Trial, Diumenti Did Not Provide Any Evidence To Establish that Brown Was Negligent In His Operation Of the Aircraft.

As established above, a plaintiff (bailor) has the ultimate burden of showing that the defendant (bailee) was negligent. Romey, 111 P.2d at 547. When the bailee has responded to a prima facie presumption of negligence by showing that she was not at fault, the plaintiff must offer evidence to counter the defendant's contention that she acted reasonably. Staheli, 655 P.2d at 683, fn.1. Otherwise, the bailee is cleared of any liability for damage to the bailed property. Id. In addition, if a plaintiff is able to establish negligence, he must also show that this negligence was the proximate cause of any damage to the bailed property. Sumsion, 132 P.2d at 687. Because Diumenti has not provided any evidence which casts doubt on the reasonableness of Brown's operation of the aircraft or

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aircraft was sometimes parked on the ramp at the Salt Lake Airport and was sometimes gone from that location. Id.

Finally, there is no evidence that the airplane was in good working order before the May 9 flight. Diumenti also has obligations under any alleged bailment contract. As the bailor, he has an obligation "that the thing or property bailed for use shall be reasonably fit for the purposes or capable of the use known or intended." Aircraft Sales & Service v. Gantt, 52 So.2d 388, 391 (Ala. 1951) (citations omitted). "[I]f the use of the instrumentality threatens serious danger to others unless it is in good condition, there is a duty to take reasonable care to ascertain its condition by inspection." Id. (citations omitted).

that Brown's conduct was the proximate cause of the damage to the airplane, Diumenti cannot sustain his damage claim against Brown.

Diumenti has provided no evidence that Brown failed to exercise due care. None of the witnesses testifying at trial would even speculate as to the cause of the accident. No witness was called or evidence presented which pointed to any error or failure on the part of Brown. Instead, the testimony was limited to assertions that the landing gear on airplanes, in general, and the particular airplane at issue, usually functions properly. Importantly, Diumenti has merely speculated on the cause of the damage to his airplane, offering no real proof as to the cause of the accident.

Diumenti's first witness, Donald Magnuson, the FAA official who was required by law to investigate this accident, testified his report of the accident contained no opinion as to the causes of the accident. Primary Trial Transcript at 67. While the landing gear was retracted when Magnuson inspected the airplane and he later tested the gear (without the weight of the airplane on it) and found it functioning, Magnuson refuse to make any suggestions concerning what (or who) caused the accident or whether the

landing gear was functioning properly when the airplane attempted to land. Id. at 62-72.

Ron Nelson, an experienced pilot did not see the airplane after the accident. Id. at 243. He too was also unable to speculate on the cause of the accident. Id. at 239. Allen Woodhouse, who helped repair the airplane after the accident, testified that according to his experience, there is no way to raise the landing gear except with the lever intended for that function. Id. at 256. However, Woodhouse also was unable to speculate on the cause of the accident. Id. at 247-256.

This evidence does not erode the conclusion that Brown completely fulfilled his duty of care in operating the airplane. No one could determine the cause of the accident and no one could point to any instance where Brown failed to exercise due care in his operation of the airplane. As a result, the evidence that Brown was without fault stands unchallenged.

Indeed, the trial court apparently agreed, remarking at the close of Diumenti's case that

> [t]here's no testimony that they [Ritter and Brown] failed to do anything. The testimony as I understand it and the state of the evidence is simply that the aircraft crashed because the landing gear was not in the down position --

> either was not in a down position or was in the down position and collapsed.

Primary Trial Transcript at 75. Where the evidence leaves to conjecture the cause of an injury, where there is more than one probable cause why the injury occurred, no recovery can be had. Sumsion, 132 P.2d at 683. "While deduction may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability." Sumsion at 683. Because Diumenti has done nothing more than raise the possibility that the accident could have been caused by Brown's negligence, but has done nothing to prove this conjecture, Diumenti is not entitled to recover from Brown. Id.[10]

IV. Diumenti's Cause of Action Against Brown For Negligence Should Be Dismissed Because There Was No Evidence At Trial That Brown Was Negligent In His Operation Of The Airplane.

Unlike under a bailment theory, a plaintiff, proceeding under on the basis of ordinary negligence, has the entire burden of showing that the defendant was at fault -- there is no presumption of negligence in a routine cause of action for failure to exercise due care. For the reasons stated

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[10] Importantly, Diumenti also failed to show that Brown's conduct -- much less his negligent conduct -- was the proximate cause of the accident.

above, that, (1) Brown proved that he was not negligent in his operation of the aircraft; (2) Diumenti offered no evidence to counter Brown's demonstration that he exercised due care; and, (3) Diumenti has left to speculation, the cause of the damage to his airplane, this Court should dismiss Diumenti's negligence cause of action against Brown. To avoid subjecting Brown to further meritless litigation in this case, this court should conclude that Diumenti was unable to prove that Brown was negligent or that Brown's actions were the cause of the damage to the airplane.

CONCLUSION

On the basis of the arguments above and the evidence in this case, this Court should find that Brown is not liable for the damage to Diumenti's airplane.

On the basis of the trial court's early dismissal of Diumenti's contract claim against Brown and the evidence at trial, this court should determine that no expressed or implied bailment existed between Diumenti and Brown. All agreements concerning the airplane were between only Diumenti and Ritter.

However, even if Brown were party to a bailment, this Court should refuse to find Brown liable for damages to the

airplane on the basis of this agreement. Brown could not be liable on any express insurance agreement in connection with bailment because the trial court already determined that he was never party to any express agreement. Furthermore, in the absence of express terms, Brown had no duty to insure the airplane. Thus, without a finding of negligence -- and the trial court made no such finding -- Brown cannot liable for the damages to the airplane.

Finally, this Court should determine that because the evidence shows that Brown exercised all reasonable care in his operation of the aircraft, he can not be liable for damage to the plane. For his bailment claim, Diumenti offered no evidence to counter the ample proof that Brown exercised due care in his flying of the airplane. Diumenti has merely speculated as to the cause of the accident and has offered no proof that Brown's conduct was the proximate cause of the ill fated landing. As a result, Diumenti cannot require that Brown pay for the damage to the airplane on the basis of either bailment or negligence. Brown fulfilled all his legal responsibilities to Diumenti -- Diumenti cannot seek compensation from Brown.

Therefore, this Court should reverse the trial court's ruling below and should order dismissal of all of Diumenti's claims against Brown with prejudice.

DATED this 11th day of April, 1994.

UTAH LEGAL CLINIC
Attorneys for Brown
Appellant/Defendant

by
BRIAN M. BARNARD

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of APRIL 1994, I caused to be mailed four (4) copies of the above and foregoing pleading defendant/appellant **Larry Brown's** Brief of Appellant with attachments to:

James C. Lewis
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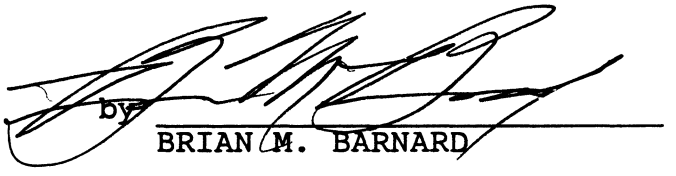
postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Appellant Brown



by
BRIAN M. BARNARD

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APPENDIX

MARSHALED FACTS RE: EXPRESS AGREEMENT CONCERNING INSURANCE COVERAGE FOR DEFENDANT LARRY BROWN'S USE OF DIUMENTI'S AIRPLANE

Transcript of April 4 and 5, 1989

Page	Line	Subject
TESTIMONY OF BROWN		
8	14-15	1974-80: pattern of leasing, renting, borrowing airplanes; "whatever was needed, not on a particular basis."
8	22-23	Sometimes it would be more than a year between flights.
9	10	Averaged less than 20 hours a year.
10-12		General pattern of leasing planes for business.
15	13-14	Diumenti required Brown to co-pilot an instruction trip from Salt Lake City to Pocatello; Brown received instruction on basic maneuvers, particularly landing the Cessna 414.
15	22	Brown landed the plane three or four times at Pocatello.
24	22	During "1980 to 1984" leased six or eight aircraft, possibly more.
25	1	Mercury Air Courier Service was the lessee.
25	17-18	Brown was not usually involved in negotiating leases; that was primarily Ritter's job.
25	21	The leases were "absolutely written always."
26	24-25	Brown assumed there was insurance covering him on the "training" flight from SLC to Pocatello; he assumed the primary pilot (the instructor pilot) was covered by insurance.
33	12	Brown had no contact with the plaintiffs concerning leasing their aircraft on May 9, the day of the accident.
33	15	Brown did not speak with Diumenti in May about using the aircraft.
34	11-24	Brown did speak with Diumenti twice in April "to explore the possibility of using his aircraft."
35	15-22	Brown and Diumenti spoke "only in the most general terms" about use of the aircraft, its capabilities, Brown's experience, Ritter's experience, insurance, possible location of the aircraft, hangaring, and terms of a lease arrangement.

36	1-4	Brown and Diumenti discussed Mercury Courier's written leases, about negotiating a price for the use of the aircraft.
36	5-9	Brown and Diumenti specifically discussed getting a waiver for Brown for coverage under Diumenti's insurance because Brown did not meet the open pilot clause on the insurance policy which Diumenti had. Brown and Ritter showed Diumenti what their insurance policies looked like.
36	15	Brown did not enter a written lease agreement with Diumenti at that time.
36	19-21	No lease was entered because the details had not been worked out; they had not gotten to the point where any of the necessary arrangements had been made.
37	11	Mercury Air Courier (MAC) was leasing other aircraft.
37	16	Those aircraft were insured.
37	19	MAC had no aircraft at that time where the lessor was insuring the aircraft.
37	25-	MAC did not intend to insure Diumenti's aircraft because
38	1-5	there were different needs and uses involved; Diumenti wanted to use his pilots, and MAC's policy could not have accommodated that.
39	12	the next time Brown had any conversation with Diumenti was when they were getting into the airplane to fly to Pocatello.
40	17-18	Brown's discussions with Ritter focused on the mechanical status of the airplane.
40	22	As of May 9, 1984, the date the plane was damaged, Brown's understanding was that the plane was not under a lease.
41	1	Brown understood the plane was being used for purposes of checking it out, weighing it, "that sort of thing."
46	7-19	A mechanic employed and paid by MAC removed the propellers for repair. He was not paid by Diumenti.
46	24	MAC paid for the repair work.
49	19-25	Brown "knew" all MAC's leases were written because he believed he saw all of them; Ritter would say the lease had been prepared; also he believed he had a copy of each of them.
50	1	Brown did not execute any of the leases.
50	7	MAC was responsible for insurance for all the other planes it leased.

52	1	Brown knew that the meeting with Diumenti at Ritter's home was about an aircraft. He did not know Diumenti and he did not know about the plane.
52	12-16	Brown was introduced to Diumenti as the chief pilot for, specifically, Mercury Air Courier Service.
52	22	The conversation was in general terms.
53	2	There was no specific agreement reached as to use of the airplane.
53	14-20	There was specific discussion about getting an insurance waiver for Brown; Diumenti said he had already done so for another pilot with far less experience than Brown, and that he saw no reason why he couldn't get insurance for Brown.
53	22-23	Brown's understanding was that Diumenti would take care of insurance.
54	1	Brown does not believe that entering a formal lease was a contingency for Diumenti getting Brown insured.
54	7-12	The only agreement resulting from that meeting was that Brown would go along on a flight to be checked out.
55	1	Brown was not aware of any further agreements being reached between Diumenti, Ritter, Brown or any entity regarding the plane.
55	10	After the training flight to Pocatello, there was no conditional, specific agreement entered into with Diumenti.
55	15	Brown engaged in no negotiations regarding leasing the plane during that flight to Pocatello.
55	18	That was the only other occasion Brown had any contact with Diumenti.
55	22	Brown had no further contact with any agents or individuals who indicated they were acting on behalf of Diumenti or the owner of the plane.
56	3	Brown did not make the arrangements for the propeller to be repaired; Ritter made the arrangements and paid for them.
57	6	Brown had no additional understanding of any agreement with the owners regarding use of the airplane.
57	9	Brown had seen no written lease.
57	11	Brown had seen no draft of a lease.
57	14-20	Brown had discussed with Ritter the potential terms of a written lease.
57	23-25	MAC's leases were not all identical; the terms were customized for each transaction.

58	9	Ritter had told Brown that a lease had not been entered into regarding the Cessna 414.
59	4-5	On May 9, the date of the flight from SLC to Tooele, Brown knew of no further understanding reached with the owners of the plane regarding use of the plane, "for purposes of Mercury Air Courier Service."
59	8-18	Brown was instructed by Ritter to fly the aircraft to Tooele, refuel it, fly it to Logan to be weighed and return to SLC. There were no additional instructions.
59	21	Brown had no permission directly from the owners to use the plane on May 9th.
60	1-3	Brown had no understanding of any specific agreement beyond the "vague discussion" at Ritter's house.

TESTIMONY OF DIUMENTI (PARTIAL TRANSCRIPT)

6	8-16	Ritter contacted Diumenti and expressed interest in leasing the Cessna 414. Diumenti said he would ask his partner and get back to Ritter.
6	17-21	Diumenti called Ritter back on April 27; he said they were interested in leasing the aircraft.
7	2-5	The purpose of the meeting at Ritter's home was to review the aircraft and the owners' willingness to lease, also to learn more about Ritter and his intended use.
7	6-13	Diumenti understood that Ritter was representing himself; there was no representation about any third party being involved.
7	16-24	Diumenti took several documents to the meeting; among them were the current INA insurance contract; and "an outline of the basis upon which Mr. Allred was trying to fathom a partnership would be willing to lease the aircraft."
8	10-13	Brown was introduced to Diumenti as an individual; the individual who would fly the airplane for Ritter's purposes under a potential lease.
9	2-3	Ritter had two basic purposes for a potential lease: cargo and humans. Diumenti, Ritter and Brown discussed these purposes.
9	6-12	Specific terms of a leasing arrangement were discussed that evening by Diumenti, Ritter and Brown.
9	15-20	There were no negotiations. Diumenti told Ritter and Brown under what terms he and his partner would be interested in leasing the plane.
9	23	Diumenti understood that an agreement was reached at that meeting.

10	1-24	Diumenti understood that **Ritter** would lease the plane under the following terms: Ritter and the partnership with ownership interest in the plane would share, pro rata, the costs of taxes, costs, maintenance, and fees based on the number of hours that each used the plane. Each party would pay their own fuel & oil. cost of repairs would be allocated ad hoc. Ritter would pay $100 per hour for use of the aircraft.
11	2-8	Terms relative to insuring the plane were discussed. The open pilot warranty in Diumenti's insurance was discussed.
11	18-25	Under the pilot provision, the insurance company would waive a pilot who had years of experience on a particular aircraft. Brown had many more hours of flying experience than pilots the insurance company had already waived (but not in the Cessna 414).
11 12	25- 1	A significant part of the evening was centered around discussing insurance.
12	2-6	Brown and Ritter said they knew Diumenti's insurance broker and that "if the matter were consummated" Brown would immediately get with the broker to get the necessary waivers to be added to the policy.
14	16-24	The obtaining of coverage for Brown was specifically discussed on Sunday, April 29. The substance of the discussion was "essentially, that should the transaction be consummated," that Ritter and Brown would seek open pilot insurance waiver for Brown.
15	12-17	Diumenti's understanding was that no additional premium would be required by the insurance company to add Brown to the policy; Diumenti had no discussion with Brown or Ritter concerning additional premiums.
15	21-24	Diumenti recalls no discussion concerning Brown and Ritter obtaining their own insurance coverage. Such a discussion would have been contrary to the desires of Diumenti and his partner.
16	4	Diumenti believed he had a specific understanding with Ritter and Brown about how the airplane would be insured if they were to use the airplane.
16	8-13	Diumenti understood that waiver on his policy was "the minimum that would be expected of them and required." He added that "should they be engaged in services or transactions that weren't covered by our policy, they would obtain insurance for those situations."
18	4	The agreement Diumenti understood he had reached with Ritter and Brown was not modified or changed prior to the flight to Pocatello; that flight took place the very next morning.

18	11-21	There were two purposes for the April 30th flight to Pocatello: Diumenti had business to transact, and Diumenti had arranged for an instructor pilot to fly the plane so that "Brown could get the required number of take-offs and landings prior to their taking possession of the airplane and making use of it."
19	20-22	Diumenti had no other conversations with Ritter or Brown that modified his understanding of what the agreement was.
19 20	24-25 1-17	Ritter, Brown and Diumenti arranged that MAC would repair the propeller. They agreed Ritter would get a credit on the $100/hour, they would pay to get the propeller repaired, and miscellaneous adjustments would be made to credit them for the cost of such repair. Diumenti was told MAC could get it done more cheaply than he could because MAC was "in the business."
20	24-25	Typically, the pilot of the plane would make arrangements for any repairs found necessary.
21	9	Ritter made the arrangements for the propeller to be repaired.
21	12	Diumenti had several conversations with Ritter between April 30th (Pocatello flight) and May 9 (Tooele flight).
21	14-25	On May 9 they discussed the incident at Tooele airport; on May 3, 1984, Ritter informed Diumenti of the nature of and arrangements for repairs to the propeller, "and that they would be using the aircraft as we had agreed prior to May 1st."
30	21	The "outline" referred to at p. 7, is something Diumenti prepared and took to the April 29 meeting.
31	2-24	Diumenti has not found a copy of the outline.
32	9	Diumenti has not asked Ritter or Brown for a copy.
32	21-23	The outline "essentially described the bases upon which Triangle Travel (the partnership of Diumenti and Allred) would be willing to lease the aircraft."
32 33	25- 1	The outline did not contain a $100/hour rate; that was discussed at the meeting.
33	5	The discussions at the meeting at Ritter's home were predominately with Ritter.
33	9-10	Diumenti understood that Ritter was the lessee.
33	15-21	Diumenti recalls testifying earlier that "the basis upon which Triangle Travel was willing to lease the aircraft" was that Ritter's pilot (Brown) "would be added to our policy and that any use beyond the use prescribed in the policy ... would be a use insured by them, if it were not already insured in the policy."

34 35	22-25 1-10	Diumenti testified at his deposition that "Ritter and Brown could carry the insurance ... "
36	1-2	Diumenti never had a telephone conversation with Brown.
36	15-18	Diumenti understood that the terms of the lease were finalized on Sunday, April 28 (?), 1984, subject to only two things: Brown's inspection and check-out in the aircraft and the obtaining of insurance.
42	8	The name of Mercury Air Courier Service did not come up in Diumenti's first conversation with Ritter.
42	11	No "agency" was disclosed by Ritter to Diumenti.
43	4	Ritter did not indicate he was acting on behalf of the business entity in the April 27 phone call.
43	15	Ritter did not indicate he was acting on behalf of MAC in the May 1 phone call.
43	19	Ritter did not intimate in any way that he was acting on behalf of any other corporate or business entity.
43	22-23	The same is true for the May 3 phone call.
44	2-5	Diumenti believes that the first time he heard of MAC was the day of the crash or sometime in the week after the crash.
44	9	Diumenti was never asked to allow the aircraft to be used by anyone other than Ritter and Brown.
44	13	Diumenti was never asked to allow the aircraft to be used by a business entity called Mercury Air Courier Services.
44	17	Diumenti had never asked for information regarding MAC.
45	11	Diumenti was not given any documents with the name Mercury Air Courier Services on them.
45	15-17	One of the two conditions which weren't taken care of on Sunday was that Ritter wanted Brown to inspect the plane, fly it ...
46	1-6	Ritter called Diumenti on May 1, indicated that the plane was fine, he wanted it, Brown liked it, and discussed the propeller problem - specifically that arrangements would be made to fix it, and that Ritter could get it done more cheaply than Diumenti.
46	17-19	Diumenti would not have allowed the repairs to be done by Ritter if he had not believed there was an agreement.
46	23-24	It was Diumenti's understanding after speaking with Ritter on May 1 that the deal was consummated.
47	2-5	Diumenti spoke with Ritter on the 1st and the 3rd

		about insurance. Ritter told Diumenti on the 3rd that he had not "heard back" from the insurance broker.
47	9	Ritter did not indicate to Diumenti that he was not going to get a waiver for Brown.
47	12-13 & 19	Diumenti did not envision a written agreement with Ritter.
47	22	There was no discussion on April 29 about a written contract.
47	25	Ritter and Brown did not show Diumenti any sort of forms or written agreements.
49	10-20	Diumenti believed that the terms of the deal were certain when he left Ritter's home on April 29 (?), subject only to inspection of the aircraft and Brown being added to the insurance policy. On May 1, Ritter acknowledged that Brown liked the aircraft, that there was a problem with the propeller, and that they were willing "to go ahead, have the thing fixed at their expense and credit it to the $100 per hour that would inure in the future."
49	25	On May 1, Ritter called and said "'Mr. Brown likes the
50	1-5	aircraft, the problem with the propeller he's discussed with me, we're going to go ahead and have that fixed; we can get it done cheaper than you. I'll be back with you directly if there's any other problems that the mechanics find.' That was said on May 1st."
50	8-9	Diumenti believed that on Sunday, April 27 (?) they had "an oral agreement subject to a condition subsequent."
50	14	Diumenti believed that on May 1st the conditions were performed and, at least, the lease was not refuted.
50	20-21	At the April 29 (?) meeting at Ritter's, Brown represented that he would be the only pilot flying the plane, after being added to the policy.
50	25	Brown made no other representations.
51	3-6	Brown said he understood what he had to do to get a waiver on the policy; he did not say he would go and get insurance coverage.
51	16-20	Diumenti told Brown on April 30 that he didn't expect the airplane to go anywhere until there was insurance.
52	21-22	Diumenti's understanding was that the lease was (to be) between Triangle Travel and Ritter, not Brown.
53	6-10	As of May 3, Diumenti "understood" that Ritter or Brown had already contacted the insurance broker; on the 3rd he asked Ritter whether they had heard back.

55	11-14	Diumenti testified in deposition that he specifically did not recall asking about insurance for Brown in the phone call of May 3.
56	1-5	Diumenti has refreshed his recollection since the deposition by reviewing his telephone logs; his recollection is "much clearer and more concise today than it was in August."
57	15-18	Diumenti's memory "is thoroughly refreshed as to the subject matter of the conversations" he had with Ritter because he chronologies his calls, and reflects on the transaction ...
57	21	There is nothing in the phone message that says anything about insurance.

TESTIMONY OF RITTER

78	11-16	Ritter and Brown met with Diumenti because they were interested in negotiating a lease for his Cessna; they wanted to find out about the aircraft.
79	21-25	Diumenti was adamant that the aircraft be insured under Diumenti's policy.
80	17	Ritter showed Diumenti Ritter's insurance policy.
80	21	The policy was in the name Mercury Air Courier Service.
80	25	There was much discussion at the meeting about Brown's qualifications and experience and qualifying under Diumenti's insurance policy.
81	18	Diumenti indicated he was going to "take care of" getting a waiver for Brown on Diumenti's policy.
81	25	Brown did not at any time say that he would "take care of" getting waived onto Diumenti's insurance.
82	4-16	There was extensive discussion of Mercury Air Courier; that there were three corporations.
82 83	19-25 1-4	Ritter discussed the functions of the corporations.
83	8	At the end of the meeting, Ritter did not understand that a lease had been finalized.
83	12	An hourly rate for leasing the plane was not decided upon during the meeting.
83	23	There were significant additional terms to be negotiated on the potential lease.
84	2-5	The only oral leases MAC had on airplanes were with FNB Leasing, because of the commonality of ownership. All other leases were written.
84	9-20	Terms which were not agreed upon: price per flying

		hour, whether there would be minimum hours per month, reserve requirements, where the aircraft would be hangared, whether the aircraft would be able to be flown Part 135 of the FAR.
85	7-9	The FAA would have had to approve the airplane and "make and model" operation under Part 135.
85	13	These terms were never resolved and agreed upon.
85	14-16	Ritter never talked with Diumenti about contacting the insurance broker.
105	25	A written lease agreement was never drafted regarding the Cessna 414 because negotiations never got that far.
106	8	Ritter and Brown did discuss "written terms of the lease agreement."
107	3	The night they met with Diumenti, Ritter and Brown had an opportunity to review the terms and conditions of Diumenti's insurance policy.
108	1-2	Ritter thought it was the insurance broker's father who had the insurance agency.
109	4	Diumenti's insurance policy had common boilerplate provisions.
109	11	The open pilot provision required significantly greater hours than MAC's policy.
109	21	Ritter understood that Diumenti would "take care of" getting Brown warrantied under Diumenti's insurance policy.
109	24-25	Ritter figured, since Diumenti was a lawyer - he knew how to "take care of it."
110	8	Every other pilot with MAC was covered under MAC's insurance policy.
111	6-10	Ritter did not see "the outline" at the meeting; he does not accept that Diumenti brought all the documents he says he did; he only saw an equipment list and insurance policy.
112	24	Ritter took MAC's insurance policy to the meeting with Diumenti.
114	11	Ritter disputes Diumenti's testimony that $100/hr had been agreed upon.
114	23	Ritter was intending to prepare a written lease for the airplane.
114	25	Ritter never began a draft of a written lease.
115	2	Ritter did not begin to draft a lease because they "weren't that close to leasing the airplane."

128	14	Ritter does not specifically remember letting Diumenti examine the MAC insurance policy.
128	24	It is possible that Ritter simply discussed the policy with Diumenti.
131	3-4	All the aircraft leased by MAC from lessors other than FBN were under written leases.
131	13	It was company policy to have written leases on all its aircraft.
132	6	Ritter, as a lawyer, recognized the need for a written lease to determine responsibilities of the parties.
132	14	At the end of April, beginning of May, all MAC aircraft were insured for their pilots and for their use.
132	19	Aircraft insurance covers not only the pilots but also the use to which the aircraft is put.
133	3	It was company policy to have insurance coverage for both use and pilot on all MAC's aircraft.
133	7	It was policy for MAC to obtain that insurance.
135	9	At the time the propeller repairs were undertaken, Ritter did not believe he had an agreement with Diumenti regarding the Cessna 414.
135	13-15	Ritter had permission from Diumenti to fix the plane.
136	3	Ritter did not believe he would be at any risk if he did the repairs and then did not lease the plane.
136 137	8-25 1-24	Ritter was familiar with the requirements of his insurance company for adding a new pilot; his policy provided "two-stage coverage." All he had to do was call with the name of a pilot and the pilot would be added to the policy. Then follow-up paperwork would be completed to verify qualifications.
138	8	Ritter's testimony, as opposed to Diumenti's, is that Diumenti agreed to get Brown covered.
138	16	Brown gave Diumenti information about his qualifications for purposes of Diumenti's getting Brown covered on Diumenti's insurance.
138	18-22	Brown told Diumenti that he was a retired Air Force pilot, that the had so many thousand hours total time, that he had multi-engine experience, but no experience in the 414.
139	1	Ritter believed that Diumenti had all he needed to get Brown covered on the policy.
139	7	Diumenti indicated to Ritter and Brown that he had all he needed.

141	24-25	Getting the aircraft weighed was a condition precedent to the effectiveness of a lease agreement; the plane was not airworthy Part 135 without it.
143	12	Ritter expected that the plane would pass the weight check.
143	17-18	Following the weight check and the propeller repair, there still needed to be a prelease inspection by MAC's mechanic.
144	1-5	Ritter would have understood that he was going to "take this aircraft and use it in connection with this new flight service" after the prelease inspection; "assuming that the open items could have been satisfactorily resolved."
144	8	Ritter intended to use the aircraft; that is why he was taking it for weighing.
145	15	Ritter did not think about the issue of insurance when he knew Brown was going to fly the Cessna to Logan.
145	21	Ritter did not stop to reflect on company policy of insuring all aircraft before using them.
145	25	Ritter did not think what might happen to the aircraft while it was in his possession, and who would pay for the damage.
146	6	Ritter did not bill Diumenti for the propeller repairs after the incident at Tooele.
146	10	Ritter did testify that he thought that if he didn't lease the aircraft, that those repairs would be paid for by Diumenti.
147	16-18	Brown was an employee of MAC on May 9, 1984; he was not in the personal employ of Ritter.
147	3	MAC received approval to fly passengers between SLC and Logan toward the end of the summer of 1984.
148	7	As of April 30, 1984 & May 9, 1984, MAC had no use for a passenger aircraft.
148	14	Between April 29 and May 9, Ritter did not have the keys to the Cessna 414.
148	17	Ritter does not know if Brown had the keys.
149	16	MAC would not have been able to fly passengers in the Cessna without a F.A.R. 135 certificate.
152	22	The Cessna was never leased by MAC from Diumenti.
153	4-6	Ritter did not reflect on the issue of insurance on May 9 because it was Diumenti's airplane, they had permission to fly it, they were doing Diumenti a favor in taking it for weighing, so that it could be leased.

156	9-11	Ritter believes that Diumenti hired MAC to get the propeller fixed and the airplane weighed.
157	13	Ritter did not speak to Diumenti directly about repairing the propeller; he exchanged messages through Diumenti's office personnel and understood that he had been retained to have those services done.
158	5	Ritter undertook the repairs pursuant to what he thought was an agreement with Diumenti.
158	11	Ritter undertook to fly the plane for the weigh-in pursuant to what he understood to be an agreement based upon those telephone conversations.
159	7	Diumenti never conveyed to Ritter that he had obtained insurance waiver for Brown.
161	17	Ritter knew that for Brown to fly the airplane, an insurance waiver was required.
161	25	Diumenti's insurance would not cover commercial passenger transport.
162	3	Diumenti's insurance would not cover the F.A.R. part 135 use.
162	9	Additional insurance would have been required for MAC to use the airplane for that use.
162	15	When the aircraft took off from SLC on May 9, Brown was operating it.

TESTIMONY OF COLLEEN RITTER

199	25	Ms. Ritter was directly present in the same room with Diumenti probably half the time the meeting lasted.
201	6-9	There were never any terms of a lease agreement that finalized; nothing was ever firmed up.
201	12-20	Diumenti was emphatic that he would take care of the insurance; he said it would not be a problem and that he would take care of getting the waiver.
201	22-25	The resolution of the meeting was that Ritter and Brown wanted to check over the plane, see if it met the part 135 qualifications, that they would stay in touch with Diumenti, and that Diumenti would take care of preparing the lease when it was ready.
202	9	It was not Ms. Ritter's understanding the Ritter or Brown would fly the airplane until Diumenti presented a lease.
202	12-18	Ritter and Brown were going to determine whether the plane met the 135 qualifications; Diumenti explained that he had a case in Idaho, and he invited Brown to go along to get checked out, and that his pilot would give Brown some training on the plane while Diumenti presented his case.

202	21	There was no other discussion about any other flights in the airplane.
203	16-18	Diumenti was emphatic that whoever flew that plane would be covered by Diumenti's insurance.

TESTIMONY OF BROWN

206	20-25	Diumenti wanted Brown covered on Diumenti's policy because his policy allowed a continuous listing of pilots that would have been difficult to do with MAC's policy.
207	4-6	There was discussion at the meeting at Ritter's house to the effect that it would not be possible to engage in commercial activities under the policy as it was written.
209	8-10	Between the Pocatello flight and May 9, the Cessna was parked in front of Thompson Beechcraft; it was gone between the times Brown observed it parked there.
209	13-15	Brown did not have the keys to the Cessna during that time; Brown did not know where the keys were during that time.
209	18	On the morning of May 9, Brown got the keys to the Cessna from the front desk at Thompson Beechcraft.
209	20-24	Diumenti had notified Thompson Beechcraft that Brown would pick up the keys to the Cessna; there was a note on "the board" that Brown would pick them up.
221	17-25	Diumenti told Brown at the meeting at Ritter's that he would arrange for the insurance. MAC's procedure was that once the insurance company agreed to a new pilot, MAC would start to use him. Brown inferred from the fact that Diumenti cleared use of the plane that insurance had been arranged.
222	3-9	Brown did not get clearance directly from Diumenti; Ritter had talked with Diumenti's secretary, who had talked with Diumenti.
225	13	Brown knew only in general terms of the arrangements regarding the repairs to the Cessna 414 before May 9.
225	15	Ritter took care of those arrangements; he was the business agent.
225	20-22	Brown was not concerned that repairs were being made with no written agreement with the owner of the aircraft; he had no reason to doubt that there was an oral agreement which was enforceable.
226	3	Brown did not personally inquire of Diumenti's insurance company as to whether he was covered to fly the plane to Logan.

* * *

LIST OF APPELLANT'S EXHIBITS

exhibit "a"	Unpublished Memorandum Decision by Utah Court of Appeals in First Appeal, (Utah App. May 12, 1992)
exhibit "b"	New Findings of Facts and Conclusions of Law, July 1993
exhibit "c"	Order and Judgment, September 7, 1993
exhibit "d"	Notice of Second Appeal, September 9, 1993
exhibit "e"	Motion for New Trial & Amended Findings & For More Findings, June 23, 1993
exhibit "f"	Notice to Submit for Decision (August 23, 1993) Re: Defendant's Motion for New Trial & Amended Findings & For More Findings, June 23, 1993
exhibit "g"	Trial Court Memorandum Decision, June 14, 1989
exhibit "h"	Findings of Fact and Conclusions of Law, July, 1989
exhibit "i"	Judgment, July, 1989
exhibit "j"	Motion to Amend Judgment or For New Trial, June 20, 1989
exhibit "k"	Order denying Motion for New Trial, July 17, 1990
exhibit "i"	Plaintiffs' Complaint, May 7, 1986

IN THE UTAH COURT OF APPEALS

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Douglas J. Allred and George S. Diumenti, Plaintiffs and Appellees, v. Larry H. Brown and Arthur J. Ritter, Defendants and Appellant.	MEMORANDUM DECISION (Not For Publication) Case No. 910040-CA F I L E D (May 12, 1992)

Third District, Salt Lake County
The Honorable James S. Sawaya

Attorneys: Brian M. Barnard and John Pace, Salt Lake City, for Appellant
William H. Lindsley and James C. Lewis, Bountiful, for Appellee

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Before Judges Garff, Jackson, and Orme.

GARFF, Judge:

Defendant Larry H. Brown appeals the trial court's ruling that he breached an oral agreement to obtain insurance to protect against damage to plaintiffs' airplane, which was leased to Arthur J. Ritter and Brown.

The trial court found that in 1984, Ritter and Brown leased plaintiffs' airplane. The court also found that the parties orally agreed that Brown and Ritter would use the airplane only after they had been added to plaintiffs' insurance or after they had obtained their own insurance. Pursuant to this agreement, the parties understood that the insurance would cover the use of the airplane by Ritter and Brown. The court further found that Ritter and Brown failed to obtain the requisite insurance.

On May 9, 1984, the airplane, while in the possession of Ritter and Brown, was damaged during a landing at the Tooele Valley Airport. When the accident occurred, neither Brown nor Ritter were covered by plaintiffs' existing insurance policy on

the airplane, nor had they obtained insurance covering their operation of the airplane.

Plaintiffs sued Ritter and Brown claiming (1) breach of contract; (2) negligence; and (3) bailment. The case was tried in April 1989. After plaintiffs' case in chief, Brown moved to dismiss plaintiffs' breach of contract claim, which motion was granted. The court took the matter under advisement after the trial.

The court issued a memorandum decision on June 14, 1989, adjudicating defendants liable, jointly and severally, to plaintiffs based on a contractual theory. On July 18, 1989, the court entered its findings of fact, conclusions of law, and judgment. The court ruled that defendants' liability was based solely on a breach of contract by failing to obtain insurance to cover damage to the airplane. The court did not refer to plaintiffs' negligence or bailment causes of action in its memorandum decision, findings, or conclusions.

Brown argues that the trial court erred in granting judgment against him on a contractual theory. We do not defer to the court's legal conclusion concerning the imposition of liability for breach of contract, but review it for correctness. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

Brown claims that the court misled him by dismissing the first cause of action alleging a contract between the parties and subsequently imposing liability based on breach of contract. Thus, he contends the court deprived him of the opportunity to defend against the breach of contract claim in his case in chief. In contrast, plaintiffs argue that their bailment cause of action also sounded in contract, and that the court based its ruling on the bailment cause of action rather than on the breach of contract claim, which was previously dismissed. Plaintiffs' argument is without merit. We recognize that the "relation [between] bailor and bailee is created in contract." Potomac Ins. Co. v. Nickson, 64 Utah 395, 231 P. 445, 448 (1924); see also Sumsion v. Streator-Smith, Inc., 103 Utah 44, 132 P.2d 680, 685 (1943) ("the entire duty of the bailee with respect to the bailed chattel is based on the bailment contract").[1] The court, however, did not refer to bailment in its memorandum decision,

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1. A bailment is created when a party's personal property is delivered to another "in trust for a specific purpose, with an express or implied contract that the property will be returned or accounted for when the specific purpose has been accomplished or when the bailor reclaims the property." Christensen v. Hoover, 643 P.2d 525, 528-29 (Colo. 1982).

findings, or conclusions. Moreover, the court did not make any findings or conclusions concerning negligence, which is the basis for liability in a cause of action for bailment. Sumsion, 132 P.2d at 685-86; see also Barlow Upholstery & Furniture v. Emmel, 533 P.2d 900, 901 (Utah 1975) (a "bailee has a duty to exercise reasonable care and caution commensurate with acceptance of the responsibility of safekeeping the property of others entrusted to him").

Therefore, we conclude that the court erred when, after dismissing the first cause of action for breach of contract, it concluded that Brown was liable to plaintiffs for breach of contract. Under Utah Rule of Civil Procedure 41(b), the dismissal "operates as an adjudication on the merits" of the breach of contract claim.[2] In reliance on the court's dismissal, Brown did not present evidence in defense of the breach of contract claim. Because Brown was prejudiced[3] by the dismissal and subsequent ruling based on breach of contract, we reverse the trial court's judgment and remand for a determination of the

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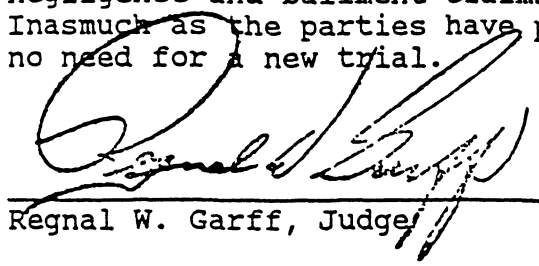
2. Rule 41(b), Utah Rules of Civil Procedure, provides in relevant part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits.

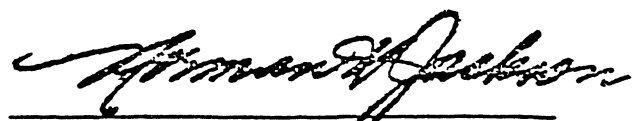
3. Cf. Radley v. Smith, 6 Utah 314, 313 P.2d 465, 467 (1957) ("[a] party who is advised of the issues and given full and fair opportunity to meet them is in no position to claim surprise or error as to the issues litigated"); National Farmers Union Property and Casualty Co. v. Thompson, 4 Utah 2d 7, 286 P.2d 249, 253 (1955) ("if an issue is to be tried and a party's rights concluded with respect thereto, he must have notice thereof and an opportunity to meet it"); Morris v. Russell, 120 Utah 545, 236 P.2d 451, 455 (1951) (court did not err in reinstating previously dismissed count because "[t]here is no showing that the defendants were misled or prevented from presenting all their evidence or in any way prejudiced by reinstating the count").

negligence and bailment claims on which the court did not rule. Inasmuch as the parties have presented all their evidence, we see no need for a new trial.



Regnal W. Garff, Judge

WE CONCUR:



Norman H. Jackson, Judge

Gregory K. Orme, Judge

COVER SHEET

CASE TITLE:

Douglas J. Allred and George S. Diumneti,
Plaintiffs and Appellees,
v. Case No. 910040-CA
Larry H. Brown and Arthur J. Ritter,
Defendants and Appellant.

May 12, 1992. MEMORANDUM DECISION (Not For Publication).

Opinion of the Court by REGNAL W. GARFF, Judge; NORMAN H. JACKSON, and GREGORY K. ORME, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of May, 1992, a true and correct copy of the foregoing MEMORANDUM DECISION was deposited in the United States mail to each of the parties listed below:

Brian M. Barnard (Argued)
John Pace
Utah Legal Clinic
214 East Fifth South
Salt Lake City, UT 84111-3204

William H. Lindsley
James Lewis (Argued)
Diumenti & Lindsley
505 South Main Street
Bountiful, UT 84010

and a true and correct copy of the foregoing MEMORANDUM DECISION was deposited in the United States mail to the district court judge listed below:

Honorable James S. Sawaya
Third District Court Judge
240 East 400 South, Room 501
Salt Lake City, UT 84111

Sheri Knighton
Deputy Clerk

TRIAL COURT:

Third District, Salt Lake County C-86-3354

James C. Lewis #1943
DIUMENTI, LEWIS & HART
Attorney for Plaintiff
505 South Main Street
Bountiful, Utah 84010
Telephone: 292-0447

COPY
8/2/93

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS J. ALLRED and, GEORGE S. DIUMENTI,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiff,	:	
vs.	:	
LARRY H. BROWN and ARTHUR, J. RITTER	:	Case No. C86-3354 Judge James S. Sawaya
Defendant.	:	

On June 8, 1993, defendant's Motion to Amend Findings came on for oral argument, with James C. Lewis appearing for plaintiffs, and Brian Barnard appearing for defendant. The matter was fully argued and submitted. Based upon the pleadings submitted in this matter, and oral argument, the Court finds as follows:

DEFENDANT'S EXHIBIT "b"

FINDINGS OF FACT

1. In 1984, plaintiffs delivered to defendants sole possession and control of a twin engine Cessna 414 (the "airplane").

2. After taking sole possession and control of the airplane, defendant made use of the airplane.

3. Defendant Brown was present and participated at a meeting wherein the lease or use of the aircraft was discussed. In addition, at such meeting, the parties, and defendant Brown discussed specifically obtaining insurance on the plane.

4. On or about May 9, 1984, while defendant Brown was piloting the plane, the airplane crashed at the Tooele Valley Airport, resulting in substantial property damage in the sum of $33,133.86.

5. Prior to the airplane crash, defendant Brown flew the plane, did landings on a flight to Pocatello, Idaho, under the supervision of the owners and a pilot they had retained for that flight. Defendant Brown inspected and viewed the plane on various other occasions prior to the airplane crash to make sure that he knew where the controls were, their functions and how operate them.

6. Prior to the airplane crash, Brown inquired of the airplane's physical condition in conversations with Bart Harker, the individual who Brown described as "our mechanic and who was doing some work on the airplane.

7. In connection with the delivery of possession and control of the airplane to defendants, defendants agreed to obtain insurance on the aircraft.

CONCLUSIONS OF LAW

The evidence before the Court supports a finding that possession and control of the airplane was delivered to defendants under a bailment arrangement, and that defendants were bailees under such arrangement.

8. The evidence further supports a finding that, under the bailment, there was an express agreement between the parties that defendants would obtain insurance to cover the airplane during the time the airplane was in the defendants possession.

9. During the time the airplane was in defendant's possession, defendants, as bailees, had sole possession and right to control the airplane.

10. As a result of defendants failure to obtain insurance, plaintiffs were damaged in the sum of $33,133.86.

11. That defendants, as bailees of the airplane, were responsible for any damages caused to the aircraft as a result of their failure to obtain insurance as agreed.

12. That plaintiffs are entitled to a judgment against defendant Brown for the sum of $33,133.86, together with interest thereon from December, 1986.

Dated this _____ day of July, 1993.

James S. Sawaya
District Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing this 22nd day of July, 1993, to:

Brian M. Barnard, Utah Legal Clinic, 214 East Fifth South, Salt Lake City, Utah 84111-3204.

S. Sheets

James C. Lewis #1943
DIUMENTI, LEWIS & HART
Attorney for Plaintiff
505 South Main Street
Bountiful, Utah 84010
Telephone: 292-0447

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS J. ALLRED and, GEORGE S. DIUMENTI,	:	ORDER AND JUDGMENT
Plaintiff,	:	
vs.	:	
LARRY H. BROWN and ARTHUR J. RITTER,	:	Case No. C86-3354 Judge James S. Sawaya
Defendant.	:	

The matter of defendant Larry H. Brown's Motion to Amend Findings came on for hearing on June, 8, 1993, before Judge James S. Sawaya; plaintiffs were represented by counsel, James C. Lewis; defendant was represented by counsel, Brian M. Barnard. The matter was fully presented, argued and submitted, and the Court's decision thereon was taken under advisement. The Court having reviewed the pleadings and the evidence in the matter, and having considered the submissions and arguments of counsel, and having theretofore signed

DEFENDANT'S EXHIBIT "C"

and filed herein Findings of Fact and Conclusions of Law, now enters judgment as follows:

Plaintiffs are granted judgment against defendant, Larry H. Brown, in the sum of $33,133.86, plus interest thereon from December 1, 1986 through August 15, 1993 in the sum of $29,270.59, for a total judgment of $62,404.45.

Dated this 1st day of September, 1993.

BY THE COURT:

/s/

JAMES S. SAWAYA
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing was mailed first class, postage prepaid on this 30th day of August, 1993 to:

Brian M. Barnard
John Pace
Utah Legal Clinic
214 East Fifth South
Salt Lake City, Utah 84111-3204

S. Sheele.

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214 East Fifth South
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Phone: (801) 328-9531 or 328-9532

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY STATE OF UTAH

DOUGLAS J. ALLRED and GEORGE S. DIUMENTI,	:	NOTICE OF APPEAL
Plaintiffs,	:	
vs.	:	Civil No. C-86-3354
LARRY H. BROWN and ARTHUR J. RITTER,	:	
Defendants.	:	(Hon. J. Sawaya)

DEFENDANT LARRY H. BROWN hereby gives notice of his appeal of that judgment entered against him in the above matter as a result of the hearing in this matter on June 8, 1993, represented by a Minute Entry of June 17, 1993 and embodied in an Order and Judgment served upon defendant's counsel on August 30, 1993.

This appeal is to the Utah Court of Appeals.

DATED this 9th day of SEPTEMBER, 1993.

UTAH LEGAL CLINIC
Attorneys for Defendant Brown

By _____
BRIAN M. BARNARD
JOHN PACE

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing NOTICE OF APPEAL to:

WILLIAM H. LINDSLEY
JAMES C. LEWIS
Attorneys for Plaintiffs
DIUMENTI & LINDSLEY
505 South Main Street
Bountiful, Utah 84010

on the 4TH day of SEPTEMBER, 1993, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Defendant

By _____
BRIAN M. BARNARD
JOHN PACE

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BRIAN M. BARNARD USB # 0215
JOHN PACE USB # 5624
UTAH LEGAL CLINIC
Attorneys for Defendant/Appellant
LARRY H. BROWN
214 East Fifth South
Salt Lake City, Utah 84111-3204
Phone: (801) 328-9531 or 328-9532

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY STATE OF UTAH

DOUGLAS J. ALLRED and GEORGE S. DIUMENTI,	:	*MOTION FOR NEW TRIAL* & AMENDED FINDINGS & FOR MORE FINDINGS
Plaintiffs,	:	(Memo Included)
vs.	:	Civil No. C-86-3354
LARRY H. BROWN and ARTHUR J. RITTER,	:	86-090-3354
Defendants.	:	(Hon. J. Sawaya)

The remaining defendant Larry H. Brown, by and through counsel, Brian M. Barnard and John Pace moves this Court pursuant to Rule 52(b) and Rule 59(a) & (e) of the Utah *Rules of Civil Procedure for a new trial, to make additional* findings, and to amend findings and in support of that motion states as follows:

Negligence

1. There has been a cause of action and claim of negligence asserted in this action. The negligence is

DEFENDANT'S EXHIBIT "e"

alleged to have occurred at about the time defendant Brown landed the subject matter aircraft at the Tooele County Airport.

2. No evidence presented at trial establishes negligence on the part of defendant Larry Brown. The testimony from Brown indicated that on approach to the Tooele County Airport for landing, he had engaged the landing gear, and that he had then verified visually on the exterior and in the interior by a check of an indicator light that the landing gear was in a down position ready for landing the airplane. He testified that he knew the landing gear was down upon approach and shortly before the plane was to touch down. Brown had no explanation as to why the landing gear was not in its proper place when the plane came into contact with the run way. It is just as likely that the equipment mal-functioned or was defective as it is that Brown breached any duty of care. Similarly, the plaintiffs presented no explanation as to why the landing gear was not in its proper place when the plane came into contact with the run way. Plaintiff did not present eye witnesses nor proof as to the status of the gear. Plaintiffs offered no proof that the landing gear was in good working order.

3. There was no evidence presented by plaintiffs (as was their burden) to show negligence on the part of any one which caused the crash and the damage to the airplane. Plaintiffs have objected to defendant Brown's request that the negligence cause of action be formally dismissed herein, however, plaintiffs have not cited any evidence in the trial record nor from the transcript of the trial that establish that there was any negligence on the part of Brown that caused damage to plaintiffs' airplane.

4. In order to finalize and resolve the question of negligence in this case, the Court should make a finding as to whether or not there was negligence.

Bailment

5. Defendant Brown requests this Court to make specific findings as to the nature and terms of the bailment which forms the basis for finding Brown liable for the harm suffered by plaintiffs.

6. Defendant Brown requests this Court to make factual findings with specific citation to the Trial Report and Transcript as to the nature and terms of the bailment which forms the basis for finding Brown liable for the harm suffered by plaintiffs.

WHEREFORE, this Court should enter a finding that there was no negligence established or proved in this case and dismiss the plaintiffs' claim and cause of action sounding in negligence. Further, Brown requests the Court to enter specific findings (with citations to the trial record) as to the terms and nature of the bailment which is the basis for defendant Brown's liability herein.

DATED this 23RD day of JUNE, 1993.

UTAH LEGAL CLINIC
Attorneys for Defendant

by
BRIAN M. BARNARD
JOHN PACE

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing MOTION FOR NEW TRIAL, NEW FINDINGS, MORE FINDINGS, ETC. to:

WILLIAM H. LINDSLEY
JAMES C. LEWIS
Attorneys for Plaintiffs
DIUMENTI & LINDSLEY
505 South Main Street
Bountiful, Utah 84010

on the 23RD day of JUNE, 1993, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Defendant

by
BRIAN M. BARNARD
JOHN PACE

BMB\C \REGCASE\MERCREHE.MOT\LIT2

BRIAN M. BARNARD USB # 0215
JOHN PACE USB # 5624
UTAH LEGAL CLINIC
214 East Fifth South
Salt Lake City, Utah 84111-3204
Phone: (801) 328-9532 or 328-9532

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS J. ALLRED and
GEORGE S. DIUMENTI,
Plaintiff

vs.

LARRY H. BROWN and
ARTHUR J. RITTER,
Defendant

NOTICE TO SUBMIT FOR DECISION

Case Number: 86-090-3354

Judge: J. Sawaya

The following motion(s) are now at issue and ready for decision of the court. The documents indicated have been filed with the court.

(a) Type of motion: Motion for New Trial & Amend Findings & For More Findings

(b) Date filed: June 23, 1993

(c) Party filing motion: Remaining Defendant

(d) ___ Affidavit in support

(e) X Memorandum in support (included in motion)

(f) ___ Affidavit in opposition

(g) ___ Memorandum in opposition

(h) ___ Memorandum in reply

(i) ___ Other pleading(s) necessary to determine motion (specify):

DATED: AUGUST 23d, 1993. UTAH LEGAL CLINIC

By _____
BRIAN BARNARD # 0215

DEFENDANT'S EXHIBIT "F"

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing NOTICE TO SUBMIT FOR DECISION to:

WILLIAM H. LINDSLEY
JAMES C. LEWIS
Attorneys for Plaintiffs
DIUMENTI & LINDSLEY
505 South Main Street
Salt Lake City, Utah 84010

on the 24th day of AUGUST, 1993, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Defendant

by
BRIAN M. BARNARD
JOHN PACE

DUPLICATE FILED WITH THIRD DISTRICT COURT CLERK
ON NOVEMBER 4, 1993.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS J. ALLRED and GEORGE S. DIUMENTI,	:	MEMORANDUM DECISION
Plaintiffs,	:	CIVIL NO. C-86-3354
vs.	:	
LARRY H. BROWN and ARTHUR J. RITTER,	:	
Defendants and Third Party Plaintiffs,	:	
vs.	:	
MERCURY AIRCOURIER SERVICE, a Utah corporation,	:	
Third Party Defendant.	:	

This matter came on regularly for trial, commencing the 4th day of April, 1989, with William H. Lindsley, Esq. appearing on behalf of the plaintiff, and Brian M. Barnard, Esq. appearing on behalf of the defendants, and Duane R. Smith, Esq. appearing on behalf of the third party defendant. The matter was fully presented, argued and submitted, and the Court's decision thereon was taken under advisement. The Third Party Complaint in this matter was dismissed upon motion of the third party plaintiff. The Court having reviewed the pleadings and the evidence in this matter, and having considered the submissions and arguments of

counsel, now makes its ruling and decision on this matter, as follows:

The Court finds the critical issue to this case to be whether there was in fact an agreement, oral in nature, as alleged and claimed by the plaintiff that defendants as part of their agreement to rent or lease the aircraft in question from the plaintiffs also agreed to provide insurance coverage for any loss or damage occasioned by their use of the aircraft. Defendants allege that plaintiffs agreed as part of the agreement of rental to provide and take care of insurance coverage for their use of the aircraft. Defendants further allege in defense that the aircraft was being leased by Mercury Aircourier Service, a corporation, rather than the defendants individually. The Court finds that the greater weight of the evidence persuades the Court, as follows:

1. The parties leasing the aircraft were the individual defendants Brown and Ritter, and not the corporation, Mercury Aircourier Service.

2. The oral agreement between the parties was that defendants agreed either to take steps to be added to plaintiff's insurance, or to obtain their own insurance policy, either of which would provide coverage for their use of the aircraft.

3. Defendants breached the agreement to provide insurance as required.

4. Plaintiffs sustained damage and loss in the sum of $33,133.86 occasioned by damage to the aircraft while it was being operated by the defendants, and in their control.

5. Plaintiffs are entitled to and are hereby awarded Judgment in the amount of $33,133.86, and for interest thereon from December 1, 1986 to the present.

Counsel for plaintiff is requested to prepare appropriate Findings of Fact, Conclusions of Law, and Judgment consistent with the foregoing.

Dated this 14th day of June, 1989.

/S/

JAMES S. SAWAYA
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, postage prepaid, to the following, this 15th day of June, 1989:

William H. Lindsley
Attorney for Plaintiff
505 S. Main Street
Bountiful, Utah 84010

Brian M. Barnard
Attorney for Defendants
214 East 500 South
Salt Lake City, Utah 84111-3204

Duane R. Smith
Attorney for Third Party Defendant
4885 South 900 East, Suite 306
Salt Lake City, Utah 84117

/s/

DIUMENTI & LINDSLEY
William H. Lindsley #1966
D. Bruce Oliver #5120
Attorneys for Plaintiffs
505 South Main Street
Bountiful, Utah 84010
Telephone: 292-0447

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

DOUGLAS J. ALLRED, and GEORGE S. DIUMENTI II, Plaintiff, vs. LARRY H. BROWN and ARTHUR J. RITTER, Defendants and Third Party Plaintiffs, vs. MERCURY AIRCOURIER SERVICE, a Utah Corporation, Third Party Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. C86-3354 Judge James S. Sawaya

The above entitled matter came on regularly for trial on the 4th day of April, 1989, before The Honorable James S. Sawaya, judge presiding, plaintiffs were present and represented by counsel, William H. Lindsley; defendants were present and represented by counsel, Brian M. Barnard; third party defendant was represented by counsel, Duane R. Smith. The matter was fully presented, argued and submitted, and the Court's decision thereon was taken under advisement. The Third Party Complaint was dismissed upon motion of the Third Party Plaintiff. The Court having reviewed the

pleadings and the evidence in the matter, and having considered the submissions and arguments of counsel, now enters the following:

FINDINGS OF FACT

1. That Douglas J. Allred and George S. Diumenti II were the owners of an aircraft, a Cessna 414, registration number N8132Q, serial number 4140032.

2. That pursuant to agreement by and between the owners of the aircraft and Larry H. Brown and Arthur J. Ritter, the latter leased said aircraft in or about the month of April 1984.

3. That the understanding by and between the parties was oral in nature and pursuant thereto it was understood that Brown and Ritter would use the aircraft only after they had taken steps to be added to plaintiff's insurance or after obtaining coverage pursuant to their own insurance, that they would assure that use of the aircraft was insured.

4. That defendants failed to take steps necessary to obtain insurance coverage.

5. That the aircraft was damaged and there was a loss incurred in the sum of 33,133.86, said damage and loss occurring while the aircraft was in the control and possession of Brown and Ritter, and while being operated by them.

6. That as a result of the damage to the aircraft the plaintiffs incurred a loss of the sum of $33,133.86.

From the foregoing Findings of Fact, the Court now makes and enters its:

CONCLUSIONS OF LAW

1. That the failure of Brown and Ritter to assure that the

aircraft was insured prior to their use of the plane constituted a breach of the contract with the plaintiffs.

2. That as a result of defendants' breach, plaintiffs were damaged in the sum of $3?,133.86.

3. That plaintiffs are entitled to a judgment against Brown and Ritter, jointly and severally, for the sum of $33,133.86 together with interest thereon from December 1, 1986.

Dated this _____ day of _____, 1989.

BY THE COURT:

_____
JAMES S. SAWAYA
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing this 14 day of July, 1989, to: Brian M. Barnard, Attorney at Law, 214 East 500 South, Salt Lake City, Utah 84111 and Duane R. Smith, Attorney at Law, 4885 South 900 East, Suite 306, Salt Lake City, Utah 84117.

B Stick

DIUMENTI & LINDSLEY
William H. Lindsley #1966
D. Bruce Oliver #5120
Attorneys for Plaintiffs
505 South Main Street
Bountiful, Utah 84010
Telephone: 292-0447

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

DOUGLAS J. ALLRED, and GEORGE S. DIUMENTI II, Plaintiff,	:	JUDGMENT
vs.	:	Case No. C86-3354
LARRY H. BROWN and ARTHUR J. RITTER,	:	Judge James S. Sawaya
Defendants and Third Party Plaintiffs,	:	
vs.	:	
MERCURY AIRCOURIER SERVICE, a Utah Corporation,	:	
Third Party Defendant.	:	

The above entitled matter came on regularly for trial on the 4th day of April, 1989, before The Honorable James S. Sawaya, judge presiding, plaintiffs were present and represented by counsel, William H. Lindsley; defendants were present and represented by counsel, Brian M. Barnard; third party defendant was represented by counsel, Duane R. Smith. The matter was fully presented, argued and submitted, and the Court's decision thereon was taken under advisement. The Third Party Complaint was dismissed upon motion of the Third Party Plaintiff. The Court having reviewed the

pleadings and the evidence in the matter, and having considered the submissions and arguments of counsel, and having heretofore signed and filed herein its Findings of Fact and Conclusions of Law, now enters judgment as follows:

1. Plaintiffs are granted judgment against defendants, jointly and severally, in the sum of $33,133.86, plus interest thereon from December 1, 1986 through June 14, 1989, in the sum of $14,084.40, for a total judgment of $47,218.26.

Dated this _____ day of _____, 1989.

BY THE COURT:

_____
JAMES S. SAWAYA
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing this 13 day of July, 1989, to: Brian M. Barnard, Attorney at Law, 214 East 500 South, Salt Lake City, Utah 84111 and Duane R. Smith, Attorney at Law, 4885 South 900 East, Suite 306, Salt Lake City, Utah 84117.

_____

UTAH LEGAL CLINIC
BRIAN M. BARNARD USB # 0215
Attorneys for Defendants
214 East Fifth South
Salt Lake City, UTAH 84111-3204
Phone: (801) 328-9531 or 328-9532

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY STATE OF UTAH

DOUGLAS J. ALLRED and GEORGE S. DIUMENTI,	:	
Plaintiffs,	:	*Civil No. C-86-3354*
vs.	:	MOTION TO AMEND
LARRY H. BROWN and ARTHUR J. RITTER,	:	JUDGMENT or FOR NEW TRIAL
Defendants.	:	(Hon. J. SAWAYA)

THE DEFENDANTS pursuant to Rule 59 of the Utah Rules of Civil Procedure move the Court to amend the judgment and memorandum decision dated June 14, 1989 addressing the plaintiffs' contract theory and cause of action and granting a decision in favor of the plaintiffs and state as follows:

1. Defendants have ordered (or will shortly order) a transcript of the trial testimony of the plaintiff, George S. Diumenti.

2. Defendants recall the testimony of George Diumenti to be that any agreement to provide insurance coverage was an agreement only by the defendant Arthur Ritter and that

the co-defendant Larry Brown was not a party to any such agreement.

WHEREFORE, the defendants request that a new trial be granted or in the alternative that the defendant Brown be exonerated from any contract claim by the plaintiffs.

DATED this 20th day of June, 1989.

BRIAN M. BARNARD
Attorney for Defendants

MAILING CERTIFICATE

I hereby certify that on the 20th day of JUNE, 1989, I caused to be mailed a copy of the above and foregoing pleading MOTION TO AMEND OR FOR NEW TRIAL to:

WILLIAM H. LINDSLEY
Attorney for Plaintiffs
505 South Main Street
Bountiful, Utah 84010

counsel for the opposing party, postage prepaid in the United States Postal Service.

by

BRIAN M. BARNARD
Attorney for Defendants

UTAH LEGAL CLINIC
BRIAN M. BARNARD USB # 0215
JOHN PACE USB # 5624
Attorneys for Defendant Brown
214 East Fifth South
Salt Lake City, UTAH 84111-3204
Phone: (801) 328-9531 or 328-9532

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY STATE OF UTAH

DOUGLAS J. ALLRED and GEORGE S. DIUMNETI,	:	
Plaintiffs,	:	Civil No. C-86-3354
vs.	:	ORDER DENYING MOTION FOR NEW TRIAL
LARRY H. BROWN and ARTHUR J. RITTER,	:	
Defendant.	:	(Hon. J. SAWAYA)

THE ABOVE CAPTIONED MATTER having come before the Court on the Motion of the Defendant Larry H. Brown for a New Trial, (dated June 20, 1989), the Court having reviewed the matter and having considered the arguments of the parties, the Court having made a minute entry of August 28, 1989 indicating the Court's ruling, based thereon and for good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motion of the defendant Larry H. Brown for a new trial should be and hereby is denied.

DATED this 17th day of JULY, 1990.

BY THE COURT:

JAMES SAWAYA
JUDGE

MAILING CERTIFICATE

I hereby certify that on the 16th day of JULY, 1990, I caused to be mailed a true and correct copy of the above and foregoing pleading ORDER DENYING MOTION FOR NEW TRIAL to:

WILLIAM H. LINDSLEY
Attorney for Plaintiffs
505 South Main Street
Bountiful, Utah 84010

counsel for the opposing party, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC
Attorneys for Defendant Brown

BRIAN M. BARNARD

DIUMENTI & LINDSLEY
William H. Lindsley
Attorney for Plaintiff
505 South Main Street
Bountiful, Utah 84010
Telephone: 292-0447

IN THE DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

DOUGLAS J. ALLRED and GEORGE S. DIUMENTI,	
Plaintiff,	COMPLAINT
vs.	
LARRY H. BROWN and ARTHUR J. RITTER,	Case No. C-86-3354
Defendants.	(Hon. James Sawaya)

Plaintiffs complain of defendants and allege as follows:

FIRST CAUSE OF ACTION

1. Plaintiffs are individuals, residents of Davis County, State of Utah.

2. Plaintiffs were and are the owners of a 1970 Cessna Model 414 aircraft, N 8132 Q.

3. In or about the latter part of April 1984, plaintiffs and defendants entered into an agreement whereby plaintiffs were to allow defendants the use and possession of the Cessna 414 aircraft averred to in paragraph 2 hereof.

4. In consideration thereof, defendants were to insure and maintain insurance on the aircraft in favor of plaintiffs, which insurance was to include liability and damage in the amounts and deductibles then enjoyed by

plaintiffs through their insurance with The Insurance Company of America, Valene Agency Incorporated, agent, of which policy, company and agency the defendants were afforded notice. In addition thereto, defendants were to hangar the aircraft at their expense, pay for all fuel and oil attendant their use of the aircraft and pay to plaintiffs the sum of $100.00 per hour for every hour of their use.

5. Attendant said agreement, defendants took possession of the aircraft on the 30th day of April, 1984.

6. On the 9th day of May, 1984, at approximately 8:55 a.m. defendants, while operating the aircraft at the Tooele Valley Airport, damaged the aircraft.

7. Defendants had failed to obtain insurance of any nature or endorsements covering their operation of the aircraft, which failure constituted a breach of their agreement with plaintiffs and as a result of said breach, plaintiffs have been damaged in the sum of $30,000.00 attendant the repair of the aircraft and further sums to be proved at trial resulting from the loss of use of the aircraft.

WHEREFORE, plaintiffs pray for judgment in the sum of $30,000.00 plus interest thereon and such further sums as proved at trial.

SECOND CAUSE OF ACTION

8. Plaintiffs incorporate paragraphs 1 through 5 of the First Cause of Action as if fully set forth herein.

9. On the 9th day of May, 1984, at the Tooele Valley Airport, in Tooele, Utah, at approximately 8:55 a.m. the defendants operated the aircraft in a negligent fashion in disregard for acknowledged and standard practices of operation, as a result of which negligence the defendants damaged the airplane

in the sum of $30,000.00 and further sums to be proved at trial resulting from the loss of use of the aircraft.

WHEREFORE, plaintiffs pray for judgment against defendants in the sum of $30,000.00 plus interest thereon and such further sums as proved at trial.

THIRD CAUSE OF ACTION

10. Plaintiffs incorporate paragraphs 1, 2, 3, 5, 6 and 9 above as if fully set forth herein.

11. That the defendant were bailees of the aircraft, the defendant the bailors. The defendants are obligated to the plaintiffs in the sum of $30,000.00 as a result of the bailment and subsequent events.

WHEREFORE, plaintiffs pray for judgment against defendants in the sum of $30,000.00 plus interest thereon.

Dated this 7 day of May, 1986.

William H. Lindsley
Attorney for Plaintiffs